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111

REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

THOMAS SERGEANT, & WM. RAWLE, JUN.

VOL. XVI.

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Eastern District of Pennsylvania, to wit :

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Clerk of the Eastern District of Pennsylvania.

JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA.

JOHN B. GIBSON, Esq., (appointed the 18th of May, 1827.)	}	Chief Justice.
THOMAS DUNCAN, Esq.	}	Justices.
MOLTON C. ROGERS, Esq.		
CHARLES HUSTON, Esq.		
JOHN TOD, Esq., (appointed the 25th of May, 1827.)	}	

ATTORNEY GENERAL,

FREDERICK SMITH, Esq.



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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

LANCASTER DISTRICT—MAY TERM, 1827.

[LANCASTER, MAY 24, 1827.]

SHARE *against* LYTLÉ.

APPEAL.

It is too late to file an appeal from the Circuit Court, after the sitting of this court, on the first day of the term to which the appeal is returnable.

IN this case, which was an appeal from the Circuit Court of *Lancaster* county, *Jenkins* moved to quash the appeal, because it was not filed after the sitting of the court, on the first of the term to which the appeal was returnable. This is too late. 4 *Yeates*, 240. 1 *Binn.* 76.

Hopkins, contra, said, the first day of the term is a unit, and if filing the appeal in the morning, before the sitting of the court, be in time, it necessarily follows, that filing it after the court sits, must be so too. The party must have the whole day, if he has any portion of it. When the court departed from the letter of the law, they necessarily let in this construction.

PER CURIAM.—The first day of the term was intended to mean the actual sitting of the court, and this much has been decided; but it is impossible, without violating the law, to carry the construction further. We consider the matter as settled, and therefore direct the appeal to be quashed.

Appeal quashed.

[LANCASTER, MAY 24, 1827.]

ALLEN *against* REESOR.

IN ERROR.

A recognizance given for the distributive shares of the heirs of an intestate, in the price of lands taken at an appraisement, is a lien only on the lands of such intestate, taken at the valuation, and not on the land of a surety in the recognizance.

ON a writ of error to the Court of Common Pleas of *Dauphin* county, it appeared that this was a case stated in that court in the nature of a special verdict, in which *John Reesor*, the defendant in error, was plaintiff below, and *John Allen*, the plaintiff in error, was defendant, to try which of the parties was entitled to a sum of money in court; arising from recent sales by the sheriff of the real estate of *Christian Forney*, situate in *Dauphin* county.

John Reesor claimed it under a judgment in his favour against *Christian Forney*, entered in the said court on the 4th of *September*, 1819. *John Allen* claimed by virtue of a recognizance taken in the Orphans' Court of the said county, on the 11th of *July*, 1818, on which judgment was entered in the Court of Common Pleas, on the 20th of *December*, 1819. *Forney* was the surety in this recognizance for *James Allen*, for the payment to the heirs of the distributive shares of the real estate late of *Joseph Allen*, deceased, which *James Allen* had taken at an appraisement made under proceedings in the said court. *John Allen* was one of the heirs for whose use the recognizance was taken: and the question was, which of the contending parties had the prior lien. The court below decided that the recognizance became a lien only from the time judgment was obtained on it, and gave judgment for the plaintiff below.

It was now assigned for error, that such a recognizance was a lien upon all the real estate of the cognizors, both principal and sureties, from its taking.

The case was now argued by *Douglass* and *Fisher*, for the plaintiff in error, and *Elder*, contra.

For the plaintiff were cited, 2 *Tidd's Pract.* 984, 985, 989. 2 *Bac. Ab.* 688. *Hob.* 195. 2 *Wms. Saund.* 8, note 5. 2 *Saund.* 51, note 4. 1 *Saund.* 157, note 1. 1 *P. Wms.* 334, 340. 3 *Co.* 71. 5 *Jacobs' Dict. Recognizance.* *Bro. Ab.* 185, pl. 20. 2 *Vern.* 234. *Shep. Touch.* 359. *Act of Assembly*, 1764, 3 *Sm. Laws*, 159. *Act of the 19th of April*, 1794, 3 *Sm. Laws*, 151. *Purd. Ab.* 288. *Act of the 4th of April*, 1797. 3 *Sm. Laws*, 297. 1 *Dall.* 131. 6 *Binn.* 141. 1 *Dall.* 265. 4 *Yeates*, 102, 103. 5 *Serg. & Rawle*, 147. 1 *Serg. & Rawle*, 502. *Act of the 1st of April*, 1785. 4 *Sm. Laws*, 246.

(Allen v. Reesor.)

For the defendant were cited, 11 *Serg. & Rawle*, 252. *Whart. Dig.* 137, No. 181. 2 *Sm. Laws*, 86. *Act of 4th of April*, 1798. *Purd. Dig.* 306. *Act of the 2d of April*, 1804. *Purd. Dig.* 298. *Act of the 4th of April*, 1797, *Purd. Dig.* 616. *Act of the 1st of April*, 1823. *Purd. Dig.* 619. 1 *Dall.* 131. 9 *Serg. & Rawle*, 397. 3 *Binn.* 559. 6 *Serg. & Rawle*, 44. 7 *Serg. & Rawle*, 1. 5 *Serg. & Rawle*, 147.

The opinion of the court was delivered by

GIBSON, C. J.—The consequences that would be produced by deciding this question in a particular way, have induced me to consider it with more than ordinary attention, and the result is a settled conviction that in *Pennsylvania* a recognizance does not bind lands, except in two instances where the contrary is established; in the one by an act of assembly, and in the other by long and continued usage.

The opposite opinion seems to have grown out of a supposition that a recognizance is a lien at the common law; than which nothing is more unfounded. This form of security was introduced to save the expense and delay of a trial; for, as the court received the acknowledgment and attested the instrument, no further proceeding was necessary to make it evident, and the recognizance, therefore, had the essential properties of a judgment. But so far was land from being bound either by judgment or recognizance, that it was not even subject to execution, being bound for the feudal services to the lord on whom a new tenant could not be imposed without his consent. And to this there were but three exceptions. The first in favour of the king, by reason of his prerogative:—The second in favour of an obligee, where the heir of the obligor was specially bound; the law dispensing with feudal objections, rather than a fair creditor should be without remedy, and subjecting the land of the obligor to execution in the hands of the heir:—And the third in favour of the grantee of a rent charge; it being indifferent to the heir of the grantor whether the land, which was liable at all events, should answer the rent by a distress or an execution, (2 *Inst.* 394. *Sir William Harbert's Case*, 3 *Rep.* 11. 2 *Bac. Abr.* 329.) A judgment or recognizance may have been a lien in favour of the king, but not of the obligee or grantee in the other excepted cases; for the lien in those cases was not the consequence of the demand having passed in *rem judicatam*, or of its having been ascertained of record; but it was in consequence of the action having been brought in respect, not of the person, but of the land itself, which was charged substantially as debtor, and therefore as having been originally bound. Moreover, the recognizance was inapplicable to those cases, as a form of security. Thus stood the law previous to the 13 *Ed.* 1, c. 18, usually called the *Stat. Westm.* 2, by which it was enacted that—“When debt is recovered or knowledge in the king’s court, or damages awarded, it

(Allen v. Reesor.)

shall be from thenceforth in the election of him that sueth for such debt or damages, to have writ that the sheriff *fieri faciat* of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and his beasts of the plough, and the one half of his land, until the debt be levied on a reasonable price or extent." This is the first and only authority in *England* for seizing lands in execution; and it consequently is the root from which has sprung the lien both of judgments and recognizances. I speak not here of statutes merchants or staple, nor of the recognizance on the 23 *Hen.* 8:—these are obligations of record in pursuance of particular acts of parliament, on which the process of execution is not according to the course of the common law, and for the purposes of the argument, we have nothing to do with them. It is certain, however, that lien was first attributed to judgments and recognizances, in giving a construction to the Stat. of *Westm.* 2; for in *Baskerville v. Brocket*, (*Cro. Jac.* 449,) it was made a question whether the lands of special bail which had been *bona fide* leased or sold after the acknowledgment of the recognizance, but before judgment against the principal, were extendible; and this on the ground of a doubt whether such recognizance were within the true intent of the statute. *Coke*, in commenting on this statute, (2 *Inst.* 394,) says, that "the execution which is given by it relates to the lands which the conusor had at the time of the judgment or acknowledgment of the recognizance;" and so is *Fitzherbert's Natura Brevium*, (594,) *Shepherd's Touchstone*, (359,) and every other respectable ancient book on the subject. In *Tidd's Practice*, (989,) a recognizance is indeed said to be a lien at the common law, and for this is cited 2 *Bac. Abr.* 363, and 1 *Co.* 14; neither of which support the position of the author, but directly the contrary. But for any thing more important than a point of practice, *Tidd* is not authority. The same thing is sometimes loosely said of judgments; but where a statute subjects lands to execution which were not so before, it is evident that all questions in relation to what lands were meant in particular, must depend on a construction of the statute itself. If the Stat. of *Westm.* 2. were repealed, no lands could be taken in execution at all, except by virtue of other statutes; so that the lien of both judgments and recognizances necessarily depends on the statute which subjects lands to be levied in satisfaction of them. In *England* it has been doubted whether any recognizance be a lien from the acknowledgment,—but without reason, recognizances being put, by the very words of the statute, on a footing with judgments, about the lien of which there never has been a doubt. Why either should have been considered a lien is not very obvious; for neither is expressly declared to be so by the statute. And even if the lien were the consequence of the words by which, since the statute, the conusor usually agrees to have the debt levied of his lands and tenements as well as of his goods and chattels, (another pregnant source of error in

(Allen v. Reesor.)

the manner of considering the subject,) still these words are just as applicable to the lands which he should have at the day of payment or even of execution levied, (in which sense they are understood as regards chattels,) as to those which he has at the acknowledgment of the recognizance. But the lien is not by force of particular words creating a charge upon land, but by force of the statute, which puts recognizances on the footing of judgments; and these bind independently of the terms of the obligation or agreement on which suit was brought, and even for damages recovered where there was no agreement at all. It is the acknowledgment of the debt, and not the agreement of the conusor to subject his lands to execution, that brings a recognizance within the statute and produces this peculiar effect. The words are,—“When debt is recovered or *known* within the king’s court, &c.” And here a doubt cannot be entertained that a recognizance on which the clause in question should be omitted, would equally be a lien by force of the statute; for where it is inserted, the parties stipulate for nothing more than what the law provides, independently of any stipulation. *Dalton* says, “the lien arises by construction of law,” (office of sheriff, 134,) and *Coke* says so too, (7 *Rep.* 39, *a.*) and, moreover, that it extends no *further back* than the date of the judgment and recognizance *only*, because the demand is in respect of the *person*, and *not* of the *land*, (*Co. Lit.* 102, *b.*) which clearly shows he did not view it as a consequence of the agreement of the conusor, or of the land being charged. But what puts the matter beyond the possibility of a doubt is, that where the conusor proceeds by original founded on the recognizance, he shall have execution of the lands had *only at the time of recovering judgment*, and not of those had at the acknowledgment of the recognizance; although it is otherwise where he proceeds by *scire facias*, and treats the recognizance as a judgment in the first instance, (*Dyer*, 306, *a. b.*) Now this distinction would be immaterial, if the lien arose from the form of the instrument, as a security pledging the land, and not as an incident of the acknowledgment as a species of judgment: in that view it would hold the land like a mortgage, independently of any mode of proceeding to have execution of it. But this, we see, is not the case. The lien, therefore, is undoubtedly by force of the statute; and my own opinion is, that the prevailing construction was adopted to give the words of it as beneficial an operation in favour of creditors as they would bear, or else in analogy to the *Stat. de Mercatoribus*, passed a few months after it, in which it is declared “that the conusor shall have execution of all the lands that were in the hands of the conusor, the day of the recognizance made, into whose hands soever they come after, either by feoffment or otherwise.” But, however this may be, it is a circumstance of decisive importance, *that the Stat. Westm. 2, is not nor ever has been in force in PENNSYLVANIA.* It is not included in the report of the judges, and its

(Allen v. Reesor.)

place is supplied by acts of our own legislature, which differ from it so essentially as to subject lands to execution only on judgment rendered.

So much for the *English* law on the subject;—and now for our own. But two passages in all our acts of assembly give colour to a notion, that lands were intended to be sold on recognizances, as in *England*. The first is the “act for taking lands in execution,” passed in 1705, by which the legislature declare, in the first section, that “all lands shall be liable to be seized and sold upon *judgment* and execution obtained;” and afterwards, in the second section, enacts, that “where any debt is hereafter recovered or damages awarded, or where any debt is *acknowledged* before such as shall have power to take cognizance thereof, and execution awarded *thereupon* to be levied upon the lands, &c. of any person whatever,” the sheriff shall not be at liberty to sell before condemnation by an inquest:—And from this recital it might seem that the legislature viewed recognizances in the light of judgments. Undoubtedly the act was passed under a belief that the Stat. *Westm.* 2; might turn out to be in force in the colony; and if that had been the case, as the legislature was not competent to repeal it without the concurrence of the crown, they may have thought it prudent to provide for what must have appeared to them an important contingency. But no intention is apparent to introduce the statute then, if it had not been introduced before: for by the first section, which alone is declaratory of the scope of the act, lands are to be liable to execution only on judgment obtained, and the act of 1700, which is the foundation of the system, in like manner authorizes execution only in pursuance of a judgment. But the whole course of our jurisprudence shows there never was a time when an execution might be issued here, directly and immediately on a recognizance, as in *England*. On the contrary, the practice has been invariable to proceed by *scire facias*, even within the year, according to the 13 *Ed.* 1. c. 45, or by original writ on the recognizance:—and, by the way, an action of debt only, and not a *scire facias*, lies in the common pleas, on a recognizance in the Orphans’ Court; for as the *scire facias* is a judicial writ, it lies only in the court which has power to award execution, and that undoubtedly is the court in which the recognizance is, (2 *Bac. Abr.* 356,) and therefore, on the principle of the case in *Dyer*, this recognizance, acknowledged in the Orphans’ Court, and sued erroneously by *scire facias* in the Common Pleas, would not be a lien even according to the Stat. *Westm.* 2. By this I do not wish to be understood that such a *scire facias* is irregular, or even erroneous; on the contrary, it is sustainable on the ground of *communis error*, but sustainable only as being substantially an action of debt, the place of which it has usurped. But to proceed. The second instance in which a recognizance might seem to be put on the footing of a judgment, is found in the supplement to the act for ac-

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knowledging and recording deeds, which was passed the 23d *September*, 1783. In the third section of this supplement, provision is made for recording mortgages which had been executed between the 1st of *January*, 1776, and the 18th of *June*, 1783; and then follows a proviso that nothing contained in the section shall operate against any subsequent judgment, *STATUTE*, *recognizance*, attainder, forfeiture, or lien, or against any subsequent *bona fide* mortgagee or purchaser. This proviso exhibits nothing but an overstrained and a ridiculous cautiousness, which could be of no manner of use; for it is palpably absurd to suppose there can be such a thing in *Pennsylvania* as a statute merchant or staple; and the inference that might be made from this provision, in favour of the lien of recognizances, would go just so far to prove the existence of statutes among us, as a peculiar species of security. Particular expressions in a statute, such as these, avail little in opposition to a system of legislation on the basis of a contrary state of things; which I affirm has taken place in a way to demonstrate that the legislature have acted on full conviction that lien is not an incident of a recognizance. The inference from the act of the 21st of *March*, 1772, for the prevention of frauds and perjuries, is forcible and direct. That act, as far as it goes, is copied from the *British* statute of frauds, of which the legislature adopted, among other things, the provision for specifying the actual date of judgments, and limiting the lien of them to that period, but rejected the analogous provision as to recognizances, by which they are declared to be a lien only from the time of enrolment; thus distinctly recognizing the lien of judgments, and refusing to recognize the supposed lien of recognizances. This omission could not have been accidental, and it therefore indisputably discloses the opinion of the legislature in 1772. Again, in 1791, when they direct satisfaction to be acknowledged of record when any judgment shall be satisfied; and in 1798, when they enact that judgments shall remain a lien for but five years, if not revived within that time by *scire facias*; they adapt the provisions of these two acts to judgments exclusively; and hence, it may be affirmed, they did not suppose a recognizance to be a lien, or else they surely would have laid it under the same restriction; for it cannot be believed that they would intentionally have removed a particular cause of offence to purchasers, and permitted another, which stood in equal mischief, to remain. But, what is still more indicative of an opinion, in the act of the 28th of *March*, 1803, by which sheriffs and coroners are directed to give security by *recognizance*, (the only instance in which the legislature has acted directly on the subject,) it is *expressly* provided that it shall be a lien on the lands of the consors; which would be an act of supererogation, at least as respects lands within the county, if it had been thought to be a lien at common law. These recognizances are to be recorded by the recorder of deeds, to give notice to the purchasers. But still fur-

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ther. No debt acknowledged or ascertained to be due, in the Orphans' Court, and of which the records of that court are the only evidence, was intended to be an incumbrance on the lands of the debtor; for when by the act of the 1st of *April*, 1823, the legislature declare, that balances found due by the executors, administrators, or guardians, shall be liens on their lands; they direct certified extracts or transcripts to be filed in the prothonotary's office; thus explicitly evincing an intention to make that office, and the office of the recorder of deeds, exclusively sources of information to purchasers; consequently, a recognizance in the Orphans' Court would not be a lien, whatever might be thought of a recognizance in the court of common law.

The lien of judgments stands on different ground. Its existence is recognized in the act of frauds and perjuries, and it obviously arises from the acts for taking land in execution; and these have received a construction which in many respects is similar to that of the Stat. *Westm.* 2. This is apparent in *Calhoun v. Snyder*, (6 *Bin.* 135,) although I am aware that in the end all the judges concurred in putting that case on the practice of our own courts.

If, then, a recognizance be not a lien at the common law, or by any positive law in force here, it remains to be seen how far it is so by a general custom of our own; and this will depend on the decisions of the courts and the practice of the profession.

In *Campbell v. Richardson*, (1 *Dall.* 131,) Chief Justice SHIPPEN, when president of the common pleas, (but at any time a great authority,) held that a recognizance is not a lien on the lands of special bail, and this on the ground of a general understanding which was said to have been carried into universal practice. Had this sound lawyer and excellent judge reflected, but for a moment, on the origin of the lien of recognizances, he would not have put the case on the existence of a custom. Next came *Walton v. Willis*, (1 *Dall.* 265,) the authority of which, as a case in point, is absolutely nothing. What was said was not the point decided, but the dictum of a single judge, thrown out in the course of the argument, without reflection and under a mistaken impression of the law.—Still, as the foundation of a practice which has produced an important anomaly, it is worthy of particular consideration. But although it be altogether certain that Chief Justice M'KEAN was under a momentary impression that a recognizance was a lien generally, yet what he did say was in relation to the case immediately under consideration, and was restricted in very special terms, to the lands taken at the valuation and acquired by the confirmation of the Orphans' Court; and in this restricted sense it has been understood by a decisive majority of the profession. The opinion intimated in *Taggart v. Cooper*, (1 *Serg. & Rawle*, 497,) went no further; and in *Kean v. Franklin*, (5 *Serg. & Rawle*, 47,) the opinion of the court was studiously restrained to the very point decided. Then, to come directly home to the

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business of the profession:—What surety, in acknowledging a recognizance was ever told that he was tying up his land? Or what counsel employed to examine a title, or purchaser examining for himself, was ever known to enter into the office of a clerk of the Orphans' Court to search for recognizances or any other supposed incumbrances. The palpable inability of that officer to afford the least information, furnishes a triumphant answer to the question. These recognizances are neither indexed nor docketted; and, as respects sureties, there is no mode of coming at a knowledge of them but turning over, leaf after leaf, all the records of the office from the judicial organization of the county. If then, in the absence of legislative provision, the every-day transactions of a whole people can give form and consistence to their laws, the question has already been determined. From a lien restricted to the very lands taken at the valuation, purchasers can suffer no injury, as the proceedings in the Orphans' Court, which constitute a link in the title, will necessarily direct them to the existence of it; but if these recognizances are to be treated as a general incumbrance, then has the legislature watched over the safety of *bona fide* purchasers in vain. The flood of litigation that would be let in would be greater than from any other source that could be opened, or from all other sources together. We cannot measure, or even guess at the extent of it. A dread of consequences may have biassed my judgment, but all my inquiries have led to one conclusion:—That neither by the *British* common law, or any *British* statute in force here, nor by any act of assembly, or usage or custom of our own, is any recognizance, except in the particular instances which I have indicated, a lien on the lands of the consors.

DUNCAN, J. I concur in the opinion just delivered, that only the lands of the intestate, taken at the valuation, are bound by recognizance, and not the land of securities who join in the recognizance, or give separate recognizances. Without entering into the consideration of the binding effects of recognizances generally, or giving any opinion on them, I decide only on the construction of our intestate acts, and the general understanding on the subject—the practical uniform exposition of the laws.

Judgment affirmed.

[LANCASTER, MAY 29, 1827.]

M'MULLEN, for the use of RUDY and Wife, against
WENNER and another.

IN ERROR.

A judgment obtained against the vendor of land, after the execution of an article of agreement, but before the execution of a deed, binds the legal estate of the vendor; and, on a sale under such judgment, the sheriff's vendee stands precisely in the situation of the original vendor, and is entitled to the unpaid purchase money, payment of which he may enforce by ejectment against the terre-tenant.

If the assignee of a bond is induced to purchase it in consequence of representations made by the obligor, that he has no defence, and is willing to pay it, the obligor cannot set up against the assignee any equity, of which he might have availed himself against the obligee, even though such communications were not made directly to the assignee or to his agent, but merely communicated to another, in his presence and hearing.

THE record of this case being returned on a writ of error to *Lebanon* county, accompanied by several bills of exceptions both to evidence and the opinion of the court, it appeared, that in the court below it was an action of debt, brought by the plaintiffs in error against the defendants in error, upon a bond dated *April* 15th, 1815, conditioned for the payment of one hundred and thirty-seven dollars and fifty cents, on the 22d of *April*, 1819, given by *Jacob* and *Daniel Wenner* to *Daniel M'Mullen*, by whom it was assigned on the 3d of *February*, 1816, to *Ann Fox*, who subsequently became the wife of *John Rudy*.

The defendants gave notice that under the plea of payment, with leave to give the special matter in evidence, they should prove that the bond on which the suit was brought was one of several bonds given by the defendants to *Daniel M'Mullen*, in consideration of a tract of land in *Dauphin* county: That previous to the date of the said bond an article of agreement was executed between *Daniel M'Mullen* and *Daniel* and *John Wenner*, dated *October* 18th, 1814, by which *M'Mullen* covenanted and agreed to convey the said land free of all incumbrances, and by deed dated the 15th of *April*, 1815, the said *M'Mullen* conveyed the said tract of land, and covenanted to defend the grantees against all claims whatsoever: That at the time of executing the said deed there was a judgment binding the said land in favour of *Samuel Ensmenger* for one thousand dollars, entered in the Court of Common Pleas of *Dauphin* county, under which the land had since been sold by the sheriff of that county. The notice contained other matters not now material.

Under this notice, the defendants, among other things, offered in evidence the article of agreement to which the notice referred, the record of a judgment in a suit brought by *Samuel Ensminger*

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against *Daniel M'Mullen* in the Court of Common Pleas of *Dauphin* county to *December* Term, 1814; to both which the counsel for the plaintiff objected; but the court overruled the objection, and admitted the evidence, and sealed bills of exception.

After the defendants had closed their case, the plaintiff proved that *Daniel M'Mullen* went to the house of old *Mr. Fox*, the father of *Ann Fox*, and offered the bond for sale. *M'Mullen*, accompanied by *Henry Fox*, the son of the old gentleman, called on *Jacob Wenner*, and told him he had found a place to sell bonds. He took the bond in question, with others, out of his pocket, and laid them on the table. *Wenner* took them up, looked at them, and said, "Yes, they are my bonds, and I am willing to pay them at any time; but I have not got the money now." *M'Mullen* asked him if he was willing the old man should buy them. *Wenner* said, "Yes; it will be better for me if you sell them hereabouts; then I can pay them easier than go to *Halifax* to pay them." *M'Mullen* then told *Wenner* that it was for this old *Fox* had sent his son along with him; that he did not trust to him. *M'Mullen* then asked *Wenner* again if he was satisfied, when he said, "Yes, I would rather have it so than not." This conversation was communicated to old *Mr. Fox* in the presence of his daughter *Ann*, and she afterwards purchased the bond on which the suit was brought, and took an assignment of it.

Several points of law were, at the conclusion of the trial, submitted to the plaintiff's counsel to the court for their opinion; on all of which the charge was in favour of the plaintiffs, except the following, viz.

"That it was the duty of *Jacob Werner*, the obligor in this bond, when called upon, to tell *Mr. Fox*, the brother of *Ann Fox*, that he had an objection to this bond, and that he would not pay it when it became due, because *Fox* was sent there for the express purpose to know whether the bond was good or not: he told *Jacob Wenner* so. And as *Jacob* did then say that this bond was good, and would be paid whenever he had money, that he cannot now gainsay it, but must pay the bond, although the consideration for which the bond was given has since failed."

The charge of the court was in these words, viz.

"The promise to pay made by *Jacob Wenner*, in the presence of *Henry Fox's* agent, would bind him to pay the bond, if it had been assigned to *Henry Fox*; but this promise would not bind him to pay a bond assigned, not to *Henry Fox* but to a third person to whom or to whose agent no promise was made, and who was not present when he made such engagement or promise to *Henry Fox's* agent. *Ann Fox* cannot take advantage of this: young *Fox* was not sent by her to *Jacob Wenner*; he was not her agent, and she was not present when *Wenner* made the promise; and, however binding the declaration of *Jacob Wenner* would be as regards *Henry Fox*, they will not bind him as to *Ann Fox*, whose duty it

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was to ascertain before the assignment, either personally or by an agent, whether *Jacob Wenner* would make defence against the payment of the bond or not, and to her bond he can set up his defence, for she is in the same situation in this suit as the assignor, *M'Mullen*, would be, were he the plaintiff. And there is not a tittle of evidence given to show that she intended to purchase this bond before *Henry Fox* called on *Wenner* and conversed with him on the subject of the bonds, or that she sent him there, or had any thing to do with his going there."

The counsel for the plaintiff excepted to the charge.

Weidman and *Foster*, for the plaintiff in error.

Norris and *Elder*, for the defendants in error.

The opinion of the court was delivered by

ROGERS, J.—This was a suit brought to recover the sum of one hundred and thirty-one dollars, fifty cents, on a bond given to secure part of the purchase money of a tract of land sold by the defendants, to *Daniel M'Mullen*, and assigned by him for a valuable consideration to the plaintiff, *Ann Fox*, since intermarried with *John Rudy*.

There is no doubt, that the assignee of a bond, whether the assignment be legal or equitable, takes it at his own peril, subject to every defalcation which might have been made against the obligee by the obligor, at the time of the assignment, or notice of it. 1 *Dall.* 23. 2 *Dall.* 49. 4 *Serg. & Rawle*, 177. The defence relied on, was, that the bond, on which suit was brought, was given to secure the payment of the purchase money of a tract of land sold by *Daniel M'Mullen* to *Daniel* and *John Wenner*. That subsequent to the articles of agreement, but before the execution of the deed, *Samuel Ensminger* obtained a judgment against *Daniel M'Mullen*, to wit, to the *December Term*, 1814, *No.* 44. The first question raised by the plaintiffs in error, is, what is the legal effect of this judgment? and about this we have no difficulty. It binds the legal estate of *Daniel M'Mullen* in the land, which was not parted with at the time of the rendition of the judgment. The sheriff's vendee would stand precisely in the situation of *M'Mullen*, and therefore it is incumbent on a purchaser to search the office for judgments, before payment of his money, up to the time of the execution of his deed. The sheriff's vendee would be entitled to the unpaid purchase money; the payment of which he could enforce, by an action of ejectment against the terre-tenant of the land. The sale of the legal estate by a judgment mesne between the articles of agreement and the execution of the deed would transfer, as a necessary incident, the money remaining unpaid. And in this there is no hardship upon the original vendee, as he has notice upon record, and can have no difficulty in protecting himself, if he uses ordinary diligence.

In an action of ejectment brought by the vendee of the sheriff,

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the original vendee, could protect himself only, by payment or tendering the purchase money, unpaid at the time of the rendition of the judgment; on doing so, he would be entitled to a conveyance of the legal title vested in the sheriff's vendee.

In the case of the sale of an equitable interest in lands, it has already been decided, that the vendee of the sheriff stands in the same situation as the former owner of the equitable interest. In *Auwater v. Mathiott*, 9 *Serg. & Rawle*, 397, it has been held that the judgment creditors of a vendee of land, who has paid part of the purchase money, and has possession of the land, but has received no deed, are entitled to the proceeds of sale of his title under an execution, in preference to the vendor.

By the law of *Pennsylvania*, all the real estate of the debtor, whether legal or equitable, is bound by a judgment against him, and may be taken in execution and sold for the satisfaction of the debt. At common law, an equitable estate is not bound by a judgment, or subject to an execution. We have no Court of Chancery, and have, therefore, from necessity, established it as a principle, that both judgment and execution have an immediate operation on equitable estates. 9 *Serg. & Rawle*, 397.

If then a judgment binds an equitable interest in lands, *a fortiori*, it binds a legal interest, and to the extent of the interest at the time of the judgment.

Although *prima facie*, the obligor may make every defence against the assignee, which at the time of the assignment, or notice of it, he could have made against the obligee, yet he may by his own conduct, preclude himself from the benefit of that right. Thus it has been held that if the assignee calls on the obligor, and informs him he is about to take an assignment of his bond, and the obligor acknowledges that it is due, without any allegation of defence, he shall not be permitted to take defence against the assignee. And this whether his silence proceeds from ignorance or design. It would be most inequitable and unjust, that he should; because if any loss afterwards occur, it arises from the negligence or folly of the obligor, and not the default of the assignee, who has taken every pains to inform himself of the real situation of the parties. If any injury accrues, it is right that he who causes it should bear the loss. The cases all go upon the ground that the assignee has acted with good faith, and without notice of any defect of title, or valid defence, and with a wish not to ensnare the obligor, but to protect himself. As bonds are an article of commerce, and are made transferable, equitably and expressly by an act of assembly, it would be legalising fraud to hold any other doctrine. It appears, that *Daniel M'Mullen* came to the house of old Mr. Fox, offered to sell this bond, that *Henry Fox* with *Daniel M'Mullen* called on *Jacob Wenner*, and told him that he had found out a place to sell the bonds. That *M'Mullen* took the bonds out of his pocket, and laid them on the table, and that *Wenner* took them up

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and looked at them and said, "Yes, they are my bonds, and I am willing to pay them at any time, but I have not got the money now." McMullen then asked him if he was willing old Fox should buy them. Wenner said, "Yes, it will be better for me, if you sell them hereabouts; then I can pay them easier than go to *Halifax* to pay them." McMullen then told Wenner that it was for this that old Fox had sent his son along with him; that he did not trust to him. McMullen then asked Wenner again if he was satisfied. He said, "Yes, I would rather have it so than not." That this conversation was communicated to old Fox in the presence of *Ann Fox*, and that *Ann Fox* purchased the bond and took the assignment on which this suit was brought.

It was not, it is true, *Ann Fox* who called on Wenner, nor was *Henry Fox* her agent; but this can make no difference in the principle. The question is, was *Ann Fox* induced to purchase the bond under the representation made by Wenner, which was communicated to her, that he had no defence, and that he was willing and desirous that the bond should be sold in the neighbourhood. If this should be the opinion of the jury, who are the proper judges of the fact, and that there was no imposition on Wenner in which she was concerned, then every principle of law, and of common sense, would say, that Wenner, and not *Ann Fox*, should sustain the loss if any arises. In such a case, the verdict of the jury should be in favour of the plaintiff to the amount due upon the bond.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, MAY 29, 1827.]

**HAWK, surviving Executor of HAWK, against GEDDIS
and another.****IN ERROR.**

What may be given in evidence under the plea of payment with leave, &c.
Of the chancery powers of the courts of *Pennsylvania*, through the instrumentality of the jury.
Of the relation of principal and surety, and how far the acts of the creditor will discharge the surety.
A. having become the purchaser of land sold by the administrators of B., under a decree of the Orphans' Court, gave bond for the purchase money, with C. as his surety, which bond was a lien on the land sold. A. afterwards sold to D. The circumstances of A. being on the decline, the obligees gave notice to D. not to pay over any more of the purchase money, as they should look to the lands for payment of the bond they held; in consequence of which, D. retained in his hands an amount sufficient to satisfy their demand. C., the surety, died, and no demand was made on his executors by the administrators of C. for payment of the bond, until suit was brought upon it, and A. had become entirely insolvent. The administrators of B. afterwards brought an ejectment against D. for the premises. *Held*, that under the circumstances of the case, the administrators of B. were not entitled to recover against the executors of the surety until after they had exhausted the land.
It seems, that in such a case, the court should instruct the jury, if the facts were proved, to find for the plaintiffs, with a condition, that all further proceedings should stay, until the plaintiffs authorized the defendant to proceed against the fund, at his cost, and, if that fund turned out defective, then that they should proceed by execution on the judgment upon the bond.

On a writ of error to the Court of Common Pleas of *Lebanon* county, it appeared that this was an action of debt on two bonds, given by *Adam Hawk* and *Michael Hawk* to *Robert Geddis*, *Samuel Casper*, and *John Wolfersberger*, administrators of *John Casper*, deceased, dated the 3d of *April*, 1810; the first conditioned for the payment of four hundred and seventy pounds, one shilling, and four pence, on the 1st of *April*, 1814; the other for the payment of a like sum on the 1st of *April*, 1815. The defendants in error, *Robert Geddis* and *Samuel Casper*, who survived *John Wolfersberger*, were plaintiffs below, and *Jonas Hawk*, surviving executor of *Michael Hawk*, deceased, the plaintiff in error, was defendant below.

The consideration of these bonds was the purchase money of a tract of land sold to *Adam Hawk* by *John Casper*, administrator, under a decree of the Orphans' Court. The land had been appraised, and the guardian of *Casper's* children having refused to take it at the appraisement, the court, on petition, granted an order of sale to the administrators. The sale made to *Adam Hawk* was returned and confirmed by the Orphans' Court, on the 1st of *April*, 1810. No deed was given by the administrators until the 21th of *March*, 1817, when they executed a conveyance to *Adam*

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Hawk, with a receipt for the purchase money. *Michael Hawk* was the surety of *Adam Hawk* in these bonds.

The defendant having, under the plea of payment with leave, &c. proved the proceedings in the Orphans' Court, the consideration of the bonds, and that *Michael* was the surety of *Adam Hawk*, and given evidence that in the year 1819 written notice was given by the administrators of *Casper* to *Peter Witman*, who had purchased from *Adam Hawk*, not to pay over any money until the purchase money due to them had been paid, as they intended to look to the land for it; in consequence of which *Witman* retained in his hands four thousand dollars, to meet their demand, offered to prove [that the three administrators of *John Casper* lived in the neighbourhood of *Adam Hawk*; that from the year 1810, to the year 1821, they saw and knew that he was squandering his estate; that they knew that *Michael Hawk* died in *December*, 1815, and were at his funeral; that they knew that *Adam Hawk* had sold the land he had purchased of them to a certain *Peter Witman* in the spring of 1817, and that *Witman* had, on the 3d of *April*, 1817, paid *Adam Hawk* the hard money, to the amount of eight thousand dollars, and given bonds for the residue; that *Robert Geddis* had all these bonds and papers in his hands as acting administrator; that *John Wolfersberger*, his co-administrator, had frequently applied to the said *Robert Geddis* to call on *Adam Hawk*, and make him pay, as he was going to ruin, but that he obstinately refused to do so; that shortly after the death of *Michael Hawk*, his executors, by advertisement in the public newspapers, called on his creditors to bring forward their claims against his estate; yet the administrators of *Casper* never made any demand or presented any claim against the said estate until this suit was brought, and *Adam Hawk* had become insolvent.]

The facts thus offered in evidence, the defendant proposed to accompany by proof, that after the death of *Michael Hawk*, to wit, in the year 1819, the plaintiffs agreed in writing to look to the said lands sold, as stated above, to *Peter Witman*, and then in possession of his son *John Witman*, for payment of the lands now in suit, and relinquished their claim upon the estate of *Michael Hawk*, of all which *Robert Geddis* gave notice to *Peter* and *John Witman*, who retained in their hands money sufficient to discharge the said bonds.

The counsel for the plaintiffs objected to the admission in evidence of that part of the offer which is embraced by brackets; and the court having sustained the objection, sealed a bill of exceptions.

The defendant then offered to prove the time of the death of the said *Michael Hawk*; to which the plaintiffs' counsel objected, and the court rejected the evidence. An exception was again taken to their opinion.

The defendant then offered to give in evidence, that after the death of *Michael Hawk*, his executors, in the public newspapers

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which circulated in the neighbourhood of the plaintiffs, who lived in a very populous community, requested all persons having demands on the estate of *Michael Hawk*, deceased, to present them for payment; yet the plaintiffs never presented their claims nor made any demand of payment of these bonds until the institution of this suit, and after *Adam Hawk*, the principal debtor, had been insolvent. To the admission of this evidence, the counsel of the plaintiffs objected, and the court having rejected it, the defendant's counsel tendered another bill of exceptions, which was sealed by the court.

The defendant next proposed to give in evidence to the jury the record of an ejectment brought to *November Term*, 1821, in the Court of Common Pleas of *Lebanon County*, by the administrators of *John Casper*, deceased, against *John Witman*, who was then in possession of the premises sold to his father, *Peter Witman*, by *Adam Hawk*. This ejectment was pending when the record was offered in evidence. The evidence was rejected by the court, on an objection being made to it by the plaintiffs' counsel, and the defendant's counsel again excepted to their opinion.

An offer was then made by the defendant to prove that with the consent of the administrators of *John Casper*, deceased, the bonds on which this suit is brought were placed in the hands of *Robert Geddis*; that both before and after the death of *Michael Hawk*, when he knew that *Adam Hawk's* circumstances were daily becoming more desperate, *John Wolfersberger*, one of the administrators of *Casper*, repeatedly called on the said *Robert Geddis*, and told him it was necessary and proper to proceed against *Adam Hawk*, to enforce payment of the bonds; but that *Geddis* always refused to do so until *Adam Hawk* became insolvent in the year 1820. The plaintiffs' counsel objected to the evidence, and the court sustained the objection; upon which the defendant again excepted to their opinion.

After the evidence was closed, the court were requested, in charging the jury, to give their opinion on the following points, and to file the same, together with their reasons therefor, of record in the cause.

1. Whether the land sold under the proceedings of the Orphans' Court, read in evidence, is bound for the payment of the purchase money.

Answer. Granted. For by the act of assembly the land was bound for the payment of the purchase money by *Adam Hawk*, who sold to *Peter Witman*, who had notice from his deed of the nature of his title; and also had notice from the administrators of *Casper* not to pay any more money to *Adam Hawk* on account of the purchase from him, as the administrators would look to the land for payment of the bonds given by *Hawk*; in consequence of which *Witman* retained, and still retains in his hands, four thousand dollars of the money due from him to *Adam Hawk*.

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2. Whether the proceedings in the Orphans' Court read in evidence are valid, and make a perfect title to the purchaser.

Answer. The proceedings of the Orphans' Court make a valid title, subject to the payment of the purchase money.

3. Whether gross neglect on the part of the plaintiffs will not discharge the surety.

Answer. Granted;—But gross negligence is a matter of fact for the consideration of the jury, and there is no evidence in this case of such gross negligence as will amount to a discharge of the surety.

4. When the obligee in a bond in any material degree lessens the responsibility of the principal, without consulting the surety, will not this discharge the surety?

Answer. Granted. It will.

5. Whether the decision of the Supreme Court settles any thing now relied on for defence in this suit.

Answer. It does not.

6. Whether, where there are two sureties for the same debt, and one is compelled to pay, cannot that one who pays call on and compel contribution from the other surety?

Answer. He can.

7. A surety who pays the debt for his principal, is entitled to be put in the place of the creditor, and to all the means which the creditor possessed, to enforce payment against the principal debtor. Is this the law, or not? and your reasons for it.

Answer. Granted. It is the law.

8. From the proceedings of the Orphans' Court, and all the other evidence given in the cause, it appears that the legal title, or fee in the lands sold, was not vested in *Adam Hawk*, on the 3d of *April*, 1810, when these bonds were executed, but only the equitable title, if any. Then was it not a fraud upon the executors of the surety, for the administrators of *Casper* to convey the legal estate in the premises to *Adam Hawk*, without consulting them, by the deed dated the 24th of *March*, 1817. And did they not thereby discharge the estate of the surety?

Answer. On the 3d of *April*, 1810, *Adam Hawk* held an equitable title, and it was not a fraud on the executors of *Michael Hawk*, when the administrators executed the deed of the 24th of *March*, 1817. Nor did they discharge the estate of the surety.

The jury found a verdict for the plaintiff for three thousand three hundred and seventy-eight dollars and one cent.

Upon the return of the record to this court, error was assigned,

1. In the opinion of the court below, upon the matters contained in the several bills of exceptions taken at the trial.

2. In their answers to the questions submitted by the defendant's counsel for their opinion, and in not giving their reasons at length, as requested by the defendant's counsel, under the authority of the act of assembly in such case made and provided.

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3. In the verdict and judgment, because they were for a greater sum than the defendant below was sued for.

Elder, for the plaintiff in error, argued that the plaintiffs below having given notice to *Wilman*, who purchased of *Hawk*, that they intended to look to the land for payment; having seen *Adam Hawk* becoming insolvent, and having been requested to sue him by *Wolfersberger*, which they refused, the defendant below had a good defence, and the court ought to have permitted him to prove it.

The defendant had a right, too, to show the death of *Michael Hawk*, and that though notice was fully given to all his creditors to present their claims, no claim was made on behalf of the estate of *John Casper*, for payment of the bonds in question.

The plaintiff below was bound to resort to the land before they pursued the surety, whose equity is superior to that of the purchaser, and who therefore is not liable until the land, the proper fund for the payment of the debt, is exhausted. 1 *Serg. & Rawle*, 188. 10 *Johns.* 587. *Id.* 539. 4 *Johns. Ch. R.* 123. 2 *Binn.* 382. *Id.* 93. 4 *Binn.* 375. 17 *Johns.* 384. 3 *Binn.* 522. 1 *Johns. R.* 332. 7 *Serg. & Rawle*, 64. 2 *Johns. Ch. R.* 554. 4 *Johns. Ch. R.* 132. 2 *Binn.* 326.

Wright and *Norris*, for the defendant in error, said, that the question discussed on the argument was not raised upon the record by the rejection of any testimony offered, and therefore ought not now to be heard. Besides, no notice was given of such matter under which the evidence offered would be received.

The purchaser, they contended, stands in equal equity with the surety, and the equities being equal, the legal liability must be enforced. 13 *Serg. & Rawle*, 157. 1 *Vez.* 337. 2 *Vez.* 569. 1 *P. Wms.* 682. The plaintiffs below were not bound to proceed against the land in the first instance: a surety may call on the obligee to sue the principal debtor, or to permit him to do so; but there was no evidence of any such step having been taken in this case; or he may pay off the debts and take an assignment of the security; but until he pays the debt, he has no equity, and cannot call for an assignment as a matter of right. The matters offered in evidence, therefore, constitute no defence to these bonds. 1 *Dall.* 126, 142, 211. 1 *Yeates*, 92. 4 *Dall.* 149. 1 *Yeates*, 574. 4 *Dall.* 137, (*note.*) 5 *Serg. & Rawle*, 323. 2 *Yeates*, 344. 1 *Yeates*, 2. 3 *Binn.* 135. 1 *Binn.* 217. 3 *Serg. & Rawle*, 578. 1 *Binn.* 578, 579. 6 *Johns. Ch. R.* 302.

The opinion of the court was delivered by

DUNCAN, J.—It will be best to consider the offers made by the defendant below, as one connected chain of evidence, as he contends that they proved a series of circumstances and transactions which, in equity, would compel the obligees to proceed against the land, in the first instance, and not against him until that fund was exhausted.

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As to the alleged want of notice of this special matter, it was not made an objection below, when it was moved, and cannot now be made. Our courts of law have, by the instrumentality of a jury, long exercised chancery powers, on the plea of payment with leave, &c. This plea and notice enable the party to give evidence of any thing which would prove, that in equity and good conscience, the plaintiff was not entitled to recover. This has been a course pursued for more than sixty years. The notice is considered as in fact a bill in equity. Payment, with leave and notice, operate substantially as bills of injunction. The verdict of a jury may be, when the injunction would be perpetual, absolute and unconditional, and when it only would be temporary, or until a particular act was required to be done, conditional. This jurisdiction is the province of the court, as a matter now become the law of the land. The jury is the instrument by which it is to be exercised under the directions of the court. *Minsker's Lessee v. Morrison*, 2 Yeates, 346. *Decamp v. Feay*, 5 Serg. & Rawle, 323. But if the jury give an absolute verdict, the court say it is conditional, and withhold the execution. All the cases on the doctrine of principal and surety seem properly the subjects of equity jurisdiction; but the rules for the relief of a surety are said to be the same in both courts when the facts are the same. *The People v. Jansen*, 7 Johns. Rep. 332; and the question on the merits here would be, was this such a case, from the facts and circumstances offered in evidence, which we are to take it the plaintiffs in error could have proved, as would entitle the party to relief in equity, and what would be the nature of that relief? It will be proper first to state that by the Act of 2d of April, 1804, 4 Sm. Laws, 138, authorizing the sale by administrators, the Orphans' Court is required on motion of the purchasers, to confirm the sale and to deem the estate to be transferred to and vested in the purchaser, as fully as the intestate held the same at his decease, *subject and liable to the payment of the purchase money*. The lien continues for the purchase money, and the purchaser takes it subject to that. The lands of the intestate remain in the hands of the purchaser, *subject to the payment of these bonds*, and the purchaser from *Adam Hawk* has retained the purchase money for that purpose. In every view, he stands in the situation of *Adam Hawk*, and has no peculiar equity. If the land was discharged of the lien, by the subsequent conveyance in 1817, and actual receipt of the purchase money, this would discharge the surety; for a surety is entitled to every remedy, which the creditor has against the principal, to enforce every security and all means of payment, to stand in the place of the creditor, not only through the medium of the security, but even of securities taken without his knowledge. He has a right to have these securities transferred to him, and avail himself of them, though there was no stipulation for that purpose; and if the obligee renders any such security, which he took from the principal

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debtor, void, this discharges the surety; for the very taking of that security by him, may have excited confidence in the security, and lulled him asleep, and deprived him of taking other security for his own eventual responsibility, until it was too late, and the rights of third persons had intervened; and therefore equity imposes an obligation on the creditor who takes the security, to take it fairly and lawfully, and to hold it impartially and justly; as for instance the security, by his very character and relation as security, has an interest that a mortgage taken from the principal debtor shall be dealt with in good faith, and held in truth, not only for the creditors' security, but for the surety's indemnity. This principle in equity will be found in *Hayes v. Wurd*, 4 *Johns. Ch.* 130. But the lien here is not cancelled, nor could it be by the administrators, unless the money had been actually paid. The receipt in the deed is not evidence which estops the party in interest from showing that it has not been paid; and here the evidence is, that it was not. The matter still turns round to this,—is the creditor compellable in equity to resort in the first instance, to that fund, under the circumstances of this case? If *Michael Hawk*, or his executors, had called on the administrators of *Casper* to proceed against the principal debtor, and they had refused, until he had become insolvent, no doubt this would discharge them. Now here, in 1819, the administrators of *Casper* gave notice to the purchaser from *Adam*, not to pay over the purchase money, as they intended to look to the land, for the payment of the money. On *Michael Hawk's* death, no demand is made against his executors, and the administrators of *Casper* give notice that they mean to look to this natural fund. This would lull the executors of *Michael Hawk* into security, and prevent them from taking measures for their own security. But the administrators of *Casper*, had taken the proper measures by giving notice to the purchaser from *Adam Hawk*. This I think is a taking to the land, and equity would compel them to exhaust that fund, before they resorted to the security. The action brought against the land for the payment, shows a prosecution of such intention, and this subsequent to this action was a circumstance. As a general rule, I do not lay it down, that the principal debtor is first to be sued. I do not think there is any such rule. In ordinary cases, the surety is liable in the first instance, though the creditor may have taken security from the principal debtor, and the surety is left to resort to the principal debtor for his indemnity, after he has paid the defendant, and is clothed, by substitution, with all the rights and securities of the creditor; but, under all the circumstances offered to be proved, I think he had a right to call upon the creditor here, to exhaust that fund which he can make available, and which the surety cannot; to resort to it in the first instance.

This is one of those strong cases, in which the creditor, in equity, and good conscience, is compellable to resort to that fund before he pursues the surety personally. It is more strong than the case

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of *Hayes v. Ward*, where the creditor had a bond and mortgage, taken in *New Jersey*, where all the parties resided, as a security for a note endorsed by the plaintiff transferred to the creditor, on a usurious loan. Instead of resorting to the mortgage or principal debtor, he sued the plaintiff while in *New York*, as indorser, and chancery granted an injunction to stay the suit at law, until the creditor had pursued his remedy on the mortgage. This is, in this case, such a plain principle of natural equity, that it would seem to require no authority to support it; but the authorities referred to by Chancellor KENT, go all the length. The right of the surety does not stand on any express contract, but on the same principles of natural justice, upon which one surety is called upon to contribute to another. The relation both of creditor on the one part, and principal debtor and surety on the other, was fully proved, and coeval with and existed at the time the lien was created by loan on the land, and the parties to this suit are entitled to all the rights, and bound by all the duties of that relation. *Michael Hawk* entered into this bond, knowing that the obligor held the land subject to the payment of the purchase money, and therefore would conclude he would encounter little risk, as it was worth more than the amount of his obligation.

This view of the subject disposes of the whole case; as well on the bills of exceptions to the rejection of evidence, as the charge of the court. The facts should be ascertained by the jury, and therefore they should have been received in evidence. In the rejection of these facts and circumstances, there was error. But the question with me is, whether there should, if the jury found these facts, have been a verdict for the defendant below, or a conditional one for the plaintiff. I think it would be more in conformity to our notions of equity, and the mode of effecting it, on a trial by jury, to have instructed the jury to find for the plaintiffs, conditioned, that all further proceedings should stay, until the plaintiffs below authorized the defendant to proceed against the fund at his cost; and if that fund turned out defective, then to proceed by execution on the judgment in this action. This, in effect, would enjoin until the creditors had done what they ought to have done, in the first instance, resorted to the remedy, of which they had given notice, and which they knew was ready for them, and retained for their use.

This record presents nothing of any third person, having any equity to interfere between the creditors and the surety. If there be any such superior equities to that of the surety, they may be let in on the new trial. They do not appear on the record. The judgment is reversed, and a *venire de novo* avoided.

ROGERS, J.—I shall offer no apology, for dissenting from the opinion of the court in this case. Whenever a judgment, which comes before us on error, can be supported without a violation of

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principle, it is my fixed determination to do so. I shall, in such cases, shut my eyes, as far as possible, to mere technical objections. I cannot consent to a reversal, for several reasons.

The judgment should, in my opinion, be affirmed, because the point which is now principally relied on, was never introduced to the attention of the court who tried the cause. This is apparent from the record, and was made still more manifest by what took place, during the discussion here. This court have, in several instances, said, that they will not interfere in such a case, unless to prevent the most glaring injustice. That it was dealing unfairly with the Court of Common Pleas, to reverse them for an error they did not commit.

I will not agree to reverse this judgment, because the error relied on, has never been assigned in this court; or, if it has, it has been assigned in such a loose, unsatisfactory way, that I must acknowledge my inability to discover it. What is the object of a special assignment of error, but to give information to the court, and the opposing counsel? It should be plainly assigned, and not a mere matter of inference. We have a rule of court to this effect, and it is even worse than useless to have rules, unless they are adhered to. It gives the careless an advantage over the careful, and I am perfectly satisfied, that great evils have already arisen in the practice, from the relaxation of rules, so as to meet the fancied justice of a particular cause. Justice, or rather favours to one party, may be injustice to the other, and to the public, in introducing a laxity of practice, which delays the public business.

I am opposed to the reversal of this case, because I think it unnecessary; for if the defendant has any equity, that equity can be attained, and his right can be protected, without a reversal of the judgment.

It is said, that *Michael Hawk* was a surety, and without pretending to determine a fact which is denied, I shall take it for granted that he was so.

Adam Hawk and *Michael Hawk*, were jointly and severally bound in this bond. The plaintiff, at the time of entering into the contract, and now, have two securities, a real security, by operation of law, a lien on the land sold, and a personal one; viz. The bonds now in suit. These securities were intended for the benefit of the plaintiffs, and *prima facie* it will not be denied that the plaintiffs have a right to enforce either or both, at their election. If there had been two sureties, instead of one, it will hardly be disputed, that they could have proceeded on a joint and several bond, against one or all; that one of three sureties, could not come into court, and pray the court to stay the suit against him, on the ground, that the plaintiffs should proceed *pari passu*, against the principal and the other surety. In this stage his equity would not arise. It is not a conditional, but an absolute undertaking on their part to pay the money. They are, as respects the

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plaintiff, all principal, and it is on the faith of their undertaking, that he has parted with his land, and with an express understanding, that they will pay him his money when it becomes due. If the surety has any equity, when does it arise, and in what manner can it be enforced? If he wishes to have a remedy against the land pledged for the debt, his course is perfectly plain. Let him pay or tender to the plaintiff the amount which he has bound himself to pay; then his equity commences; and until this is done, he has no equity. If the plaintiff refuses to assign the remedy against the real fund, he has a right to the interposition of the court. He has a right to a substitution in the place of the plaintiff, to all his remedies against the land, which is bound as a security for the money.

In this view of the case, I am sustained by the authority of *Hayes v. Ward and others*, 4 *Johns. Ch. R.* 123. A surety who pays the debt, is entitled to be put in the place of the creditor, and to all the means, and every remedy, which the creditor possesses, to enforce payment from the principal debtor.

"I am not aware," says the chancellor, "that there is any general rule in chancery, that a creditor must look to the principal debtor, and exhaust his remedy against him before he can be permitted to resort to the surety. The general language in the books, and the practice has been otherwise, and the surety has been considered (without a formal adjudication on the point, and perhaps without any examination of its principle,) as amenable in ordinary cases to the creditor in the first instance, though the creditor may have taken ample security from the principal debtor. The creditor has usually called on the surety, at his election, and left him to resort to the principal debtor for his indemnity, after he has paid the debt, and after he has been clothed by substitution with all the rights and securities of the creditor."

Under very particular circumstances, it is true, the surety has a right to call on the creditor, to do the best he can for his benefit. In this case, the attention of the Court of Common Pleas was not even called to the matter now *alleged*—not *assigned* for error here. It is not even pretended, that there was payment or an offer to pay on the part of the surety. Now, I am at a loss to perceive, where those particular circumstances are, which give the surety a right to call on the creditor, to do the most he can, for his benefit.

The bill of exceptions, on which the cause is reversed, is the exclusion of the record of a suit, still depending; being an ejectment brought by the administrators of *John Casper*, deceased, against *John Witman*, who was in possession of the premises sold by the plaintiffs to *Adam Hawk*, at the time of suit brought in *Lebanon Common Pleas*, of *November Term*, 1821, *No. 24*.

Had this record been offered in evidence by the plaintiff, it would, in my opinion, have been error to have excluded it. It would have

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been evidence, because it would have shown that the plaintiffs were pursuing both the remedies at the same time. All pretence would have been removed for saying, that the plaintiffs were oppressing the surety, by compelling him to pay, when they have real security for their money.

The doctrine, that a creditor having a particular fund, may be compelled to resort to that fund before he pursues the debtor personally, has been fully considered in the case of *Hayes v. Ward, 4 Johns. Ch. R.* and the chancellor has come to the conclusion, that such a general rule does not exist. "Without meaning," say the court, "to lay down any such general rule, (and for which I have not seen any sufficient authority in the equity jurisprudence of *England*,) I think the peculiar circumstances in this case, call for a continuance of the injunction."

Suppose the record of the suit offered had been in evidence. It is said, it would have shown the existence of a lien for the purchase money against the land. Would that have been a sufficient defence without more, or would not the plaintiff in this case have been entitled to judgment notwithstanding? The doctrine in equity, and I may say of common sense, is—The surety *who pays* the debt, is entitled to be substituted in the place of the creditor, and to all the remedy or means possessed by the creditor, to enforce payment from the principal debtor.

Here then there was neither judgment, nor tender of payment, but a mere offer of a record, which merely shows the existence of a lien on the property sold by the administrators.

I have already stated that I was opposed to the reversal of this case, because if the defendant has any equity, that equity can be obtained, and his rights protected without a reversal of the judgment; upon the payment of the money, until which, his equity does not arise, he will have a right to be substituted in the place of the plaintiff, to be clothed with all his rights and securities. Let him pay, or tender the money due, and the court will, upon application, permit him to use the judgment which has already been obtained against *Adam Hawk*, and in this way reach the real fund. If the plaintiff will not assign, the court will give him liberty to use his judgment, and will protect his equitable interest in it. Or they may stay the execution on this judgment until the plaintiff assign to him the judgment against *Adam Hawk*.

But it is said, that the doctrine of substitution is an equitable principle of the court, and can only be exercised through the medium of a jury. That the equitable, as well as the legal power of the court, is ordinarily exercised in this way, I admit, but that it is the only or the best mode I deny. Suppose judgment bonds had been given on which judgment had been entered. The plaintiff proceeds against the surety and levies the money from him, how would the surety be substituted? Would it not be an act of

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the court alone, and would the intervention of a jury be necessary, unless some fact was denied?

Two cases have been cited, to prove the doctrine that equity in *Pennsylvania* can only be administered through the instrumentality of a jury. The court, in *Decamp v. Feay*, 5 *Serg. & Rawle*, 323, decided that, on principles of equity, in *Pennsylvania*, the jury may find damages conditionally, prescribing the terms on which they shall be released; but that it is not competent to the court to instruct the jury to find damages sufficient to ensure a specific execution of a contract, and that the court would control the plaintiffs in the use of the verdict. Such an instruction as that to a jury, I would not hesitate to say, would be error. But I am at a loss to perceive the assertion of the principle, that the equity powers of the court can only be administered through the medium of a jury.

Nor am I disposed to differ with the court, when the damages are given absolutely, and as a measure of compensation, proportioned to the extent of the injury. I know not how the court can say they were given conditionally, and on that ground withhold the execution.

In the case of *Minsker's Lessee v. Morrison*, 2 *Yeates*, 344, the court say that the Supreme Court, and the several Courts of Common Pleas, have an implied limited chancery jurisdiction under the words of the constitution. But this authority is to be used with sound discretion, and the intervention of a jury is indispensably necessary, according to the adopted practice. This, it will be observed, is a mere *dictum*, and cannot with propriety be extended further than to the case which was then before the court, which was an equitable action of ejectment, depending upon a number of disputed facts. Besides, it is well known that the equitable powers of the courts have been much extended since that period, and are now much better understood. The multiplication and variety of contracts now require a different rule. A jury would be a useless incumbrance on a question of equitable jurisdiction, unless there were some disputed facts—facts disputed in such a way as to compel a Court of Chancery to direct an issue, which is the ordinary mode in the practice of that court.

Although it is always with regret, and great diffidence, that I differ from the court, yet I feel compelled, for the above reasons, to say that the judgment should be affirmed.

Judgment reversed.

[LANCASTER, MAY 29, 1827.]

TATE and Wife *against* STOOLTZFOOS and others.

The omission to state in the certificate the acknowledgment of a release by husband and wife, that the wife was separately examined, is cured by the act of the 3d of *April*, 1826.
That act is constitutional.

His Honour Judge HUSTON, before whom this cause was tried at a Circuit Court held for *Lancaster* county in *April*, 1827, reported it to be an ejectment brought by *Samuel Tate* and *Jane Mary*, his wife, against *John Stooltzfoos and others*, to recover forty-two acres of land in *Leacock* township, to which the plaintiffs showed title, in right of *Jane Mary* the wife.

The defendants claimed under *James Hamilton*, and as a part of their title exhibited a release executed by *James Cochran*, and *Jane Mary*, his wife, (since married to *Samuel Tate* the plaintiff) to the said *James Hamilton* for the land in controversy, annexed to which was an acknowledgment, of which the following is a copy.

“Before me, the subscriber, one of the associate judges of the Court of Common Pleas in and for the county of *Lancaster*, came *James Cochran* and *Jane Mary*, his wife, and acknowledged the within instrument of writing to be their act and deed, and desired that the same might be recorded as such. Witness my hand, &c. 28th *May* 1796.”

The verdict being for the defendants, the plaintiffs moved for a new trial, which the judge refused, whereupon the plaintiffs appealed for the following reasons.

1st. The court improperly admitted in evidence a release executed by *James Cochran* and *Jane Mary*, his wife, (the latter one of the plaintiffs in this suit, and the land being claimed in her right) to *James Hamilton* his heirs and assigns, which release was not duly acknowledged according to the provisions of the several acts of assembly in such case made and provided.

2. The court gave it in charge to the jury that the acknowledgment of the release before mentioned, was sufficient under the provisions of the act of the 3d of *April*, 1826, to bar the recovery in this action.

The act referred to declares, “That no grant, bargain, sale, feoffment, deed of conveyance, lease, release, or other assurance of any lands, tenements and hereditaments whatsoever, heretofore *bona fide* made and executed by husband and wife, and acknowledged by them before some judge, justice of the peace, or other officer authorized by law within this state, or an officer in one of the *United States*, to take such acknowledgment as aforesaid before the 1st day of *September* next, shall be deemed, held, or adjudged invalid, or defective, or insufficient in law, or avoided or

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prejudiced, by reason of any informality or omission in setting forth the particulars of the acknowledgment made before such officer as aforesaid in the certificate thereof; but all and every such grant, bargain, sale, feoffment, and deed of conveyance, lease, release or other assurance, so made, executed, and acknowledged as aforesaid, shall be as good, valid, and effectual in law, for transferring passing and conveying the estate, right, title and interest of such husband and wife, of, in, and to the lands, tenements, and hereditaments mentioned in the same, as if all the requisites and particulars of such acknowledgment mentioned in the act to which this is supplementary, were particularly set forth in the certificate thereof, or appeared upon the face of the same."

Judge HUSTON having ruled the point without argument and without prejudice, for the purpose of bringing it before the court in bank, sat during the argument.

Rogers and C. Champneys, for the appellants. At common law the acts of a feme covert are void, and she can convey her estate only by a deed acknowledged pursuant to the act of 1770. Here there was no separate examination and the defect not cured by the act of the 3d of April, 1826. *Pamph. Laws of 1826, p. 187*; because the case is not within it. That act was passed in consequence of certain decisions of this court, but in every case which had been decided, there was a separate examination. The act was intended to cure only an *informality* in a circumstance or particular omission, not the total want of compliance with a substantial provision of the existing acts: in this case there is no such certificate as is contemplated by the act of 1770, under which the separate examination is of the essence of the acknowledgment.

But the act of 1826 is unconstitutional and void. At the passing of that act the deed of the feme being absolutely void, could not be set up by the legislature without making a conveyance for her, which was not competent for them to do. When that act passed the title was in the feme, or those who claim under her; and that title could not be divested by any subsequent legislative act. Whether she were in possession, or it had passed from her under a void conveyance, can make no difference. *Vanhorne v. Dorrance, 2 Dall. 304*. There is no disguising the effect of this act, which transfers the property of A. to B. without his consent, and without making compensation. This is precisely the case of *Vanhorn and Dorrance*. To enable the legislature to exercise an arbitrary discretion over vested rights, would vest in them a tremendous power which it cannot be supposed the constitution ever meant to give them.

The court did not hear the counsel for the appellees.

The opinion of the court was delivered by

DUNCAN, J.—This was an appeal from the decision of Mr. Justice HUSTON, at a Circuit Court held at Lancaster, April, 1827,

(Tate and Wife v. Stooltzfoos and others.)

admitting in evidence the release of *James Cochran* and *Jane Mary*, his wife, on an acknowledgment of the instrument by husband and wife, of the 28th of *May*, 1796, of the wife's real estate in the following words:—" *James Cochran* and *Jane Mary*, his wife, came before me, the subscriber, one of the associate judges of the Court of Common Pleas, in and for the county of *Lancaster*, and acknowledged the within instrument to be their act and deed, and desired that the same might be recorded as such." And also in instructing the jury, that the release thus acknowledged was sufficient, under the provisions of the act of the 3d of *April*, 1826, to bar all claim to recovery in right of the wife.

It is contended, first, that this defective acknowledgment is not cured by that act. While I agree that the retrospective powers of this act are to be construed strictly, and that every law of this nature is to be construed with strictness, and not to be extended by equity beyond the words of the statute; yet I cannot agree to a construction that would defeat the end and object of the law, and I must confess it appears to me that in words as clear as our language affords, this provision embraces every defect, cures every invalidity in the certificate of acknowledgment, where the conveyance is a *bona fide* one. The purview, the preamble, and the enacting clause, conduce to prove that it was the intention of the legislature that no acknowledgment should be held invalid, defective, or insufficient in law, by reason of any omission, formal or substantial, in not setting forth the particulars of an acknowledgment in the certificate. And my opinion is, that if the wife does acknowledge the conveyance to be her act and deed, before an officer authorized by law to take it, this acknowledgment is sufficient, though it omit all the particulars required under the former act. It is impossible to make an enactment more expressive and comprehensive; for the naked acknowledgment is made as good, valid, and effective in law, for transferring the estate, as if all the requisites and particulars of the acknowledgment recited in the former act had been particularly set forth in the certificate thereof, or appeared upon the face of the same. It is here to be observed, that this act only alters defective acknowledgments before the 1st of *September*, 1826.

It is next objected, that this act is unconstitutional. The general rule is, that all laws are in their nature prospective, yet this does not prohibit the legislature from passing some laws which have a retrospective operation. Where the laws do not impair the obligation of contracts, or are not *ex post facto*, (*ex post facto* relate to crimes only,) every confirmatory act is in its nature retrospective; and, in the opinion of the court delivered in *Underwood v. Lilly*, (10 *Serg. & Rawle*, 101,) it is stated, "that confirming acts are not uncommon. Deeds acknowledged defectively by females covert, proceedings and judgments of commissioners, and justices of the peace, who were not commissioned, agreeably to the constitution, or when their power ceased on the division of

(Tate and Wife v. Stooltzfoos and others.)

counties until a new appointment. Retrospective laws, which only vary the remedies, divest no right, but merely cure a defect in proceedings otherwise fair,—the omission of formalities which do not diminish existing obligations, contrary to their situation when entered into. These, and several like acts, are clearly constitutional.”

I have seen no reason to change that opinion. I will just add, that it is an abuse of terms to contend that this is an act divesting vested rights. Such acts would be odious and unjust, as well as unconstitutional; for it is not intended by a vested right, that it shall be a right to do wrong; to take advantage of a mere slip in form, where the transaction is a *bona fide* one; and to avoid an honest conveyance fairly acknowledged, in the hands of an innocent purchaser. Statutes made to confirm acts by public officers which would have been void for some informality, have never been questioned on constitutional grounds. See *Bond v. Appleton*, 8 Mass. Rep. 472.

It is well that this question has been brought up so early after passing the act, to put the matter at rest, and silence the speculations, opinions, and doubts expressed even by some men in the profession, and to relieve from apprehension those *bona fide* purchasers who might otherwise have been affected by informal certificates of acknowledgments, and that the hundreds, I might say thousands, intended to be relieved from danger for this one cause, may now repose in peace under this law confirming their titles—no man can make them afraid.

It is the opinion of the court that the appeal be dismissed, and Judgment affirmed.

ROGERS, J., having been counsel in the cause, took no part in the decision.

[LANCASTER, MAY 29, 1827.]

STROHECKER *against* DRINKLE, Administrator de bonis non of GESHER.

A general verdict for the plaintiff, on the pleas of *non assumpsit*, *plene administravit*, and debts of a higher nature, is, substantially, a finding of assets to the amount of the demands, and good.

On the trial of this case before Judge DUNCAN, at a Circuit Court in Berks on the 26th of April, 1827, on the pleas of *non assumpsit* and *plene administravit* and debts of a higher nature, replication and issue, the jury found a verdict in favour of the plaintiff for seven thousand nine hundred and nineteen dollars, and thirty-five cents damages, and six cents costs.

(Strohecker v. Drinkle, Administrator de bonis non of Gesher.)

A motion in arrest of judgment having been overruled, the defendant appealed to this court.

Downing and Baird, for the defendant.—The plea of *plene administravit* was a substantial one, and intended for substantial purposes. Under this plea, the proof rested in the first instance with the plaintiff, who was bound to show the existence of assets in the hands of the defendant; and instead of a general finding for the plaintiff, the jury ought to have found all the issues. *Kerr v. Hawthorn*, 4 Yeates, 295. 2 Co. Inst. 227. *Booth's Executors v. Armstrong*, 2 Wash. 301. 3 Mumf. 65. *Fairfax v. Fairfax*, 5 Cranch, 19. 4 Mumf. 466, 492. 2 Stark. 554. 2 Phil. Ev. 295. *Norris's Peake*, 561.

The *Attorney General* and *Biddle* for the plaintiff.—This is not a writ of error. This court can now do whatever the Circuit Court might have done, and amend the verdict if necessary. The plea of *plene administravit* is affirmative, and consequently the burden of the proof was on the defendant, who cannot take advantage of having failed to make out his plea. *Burrows v. Heisham*, 1 Dall. 138. 13 Serg. & Rawle, 300. 5 Burr. 2730. 1 Binn 397. 1 Johns. Ch. R. 277. *Norris's Peake*, 561. It is not universally true that the jury must pass upon all the issues; where there were pleas of not guilty and *son assault demesne*, a verdict of guilty generally was held good. 2 Burr. 698. So where upon *non cepit* and avowry, the verdict was on the first issue, and nothing said as to the avowry. 14 Johns. 84. In the cases cited on the other side, evidence was given under the plea of *plene administravit*. In this there was error.

The opinion of the court was delivered by

GIBSON, J.—There is no surer rule than that the jury must dispose of all the issues; and for my own part I see no difference in this respect, between issues that are affirmative as respects the party who obtains the verdict, and those that are negative. It is necessary to show that every allegation material to the cause, has been considered and determined, and this whether it were made on the one part or on the other. The *English* practice requires a particular finding of each issue, although the rule is not of universal application; and, where the truth will warrant it, an issue taken on the plea of *plene administravit* is to be disposed of by finding a particular amount of assets unadministered in the hands of the executor. But as the plaintiff is not interested in proving assets beyond the amount of his demand, it is not usual to find the whole of what is unadministered, but only a sum sufficient to cover what is found due. By our practice, which is more loose than the *English* or that of almost any other state, it is unusual to pass on all the issues in the cause separately, (although in cases like the present, I admit it has been usual to find the amount of the assets specially,) but a general finding for the plaintiff is considered as equi-

(Strohecker v. Drinkle, Administrator de bonis non of Gesher.)

valent to an express negative to each particular plea. Why then shall we not treat this verdict as a finding of assets to the value of the demand? Amendments may be made here as fully as in the Circuit Court; or if the verdict be amendable at all, we are to consider it as already amended. Now it is reasonable to intend that the jury went on the ground that assets to the value of the demand were proved; else they would never have found for the plaintiff generally. This intendment is not a jot more strained than that in *Hawks v. Crofton*, (2 Burr. 698,) where, on "not guilty *son assault demesne*," the jury found the defendant "guilty of the trespass within written" without noticing the plea of *son assault*; on which Lord MANSFIELD held that where the *intention* of the jury is manifest, the court will set right mere matter of form and give judgment on the substantial finding; and both FOSTER and WILMOT, Js., said *the jury could not have found thus unless the defendant had FAILED in proving his special plea*. Is not this exactly our case? To the same effect is *Thompson v. Burton*, (14 Johns. 84,) where the jury found against the defendant in replevin without particularly noticing an avowry on which issue was joined. If then the ancient practice in this respect, has been relaxed in *England* and the state of *New York*, where an attention to form is more rigidly enforced, there would be an affectation of precision in refusing to sustain such a verdict here. There is no question as to the merits; and we could not, with any show of propriety, arrest the judgment on ground so purely technical as that on which this motion is founded.

Appeal dismissed, and judgment for the plaintiff.

[LANCASTER, MAY 29, 1827.]

REESE *against* ADDAMS.

The owner of the land is the person in whose name proceedings are to be instituted to recover the compensation prescribed by the 10th and 11th sections of the Act of the 8th of *March*, 1815, incorporating the *Schuylkill* Navigation Company, for an injury done by the erection of dams, &c; but if the land be charged with the payment of legacies or subject to other liens, the owner is a trustee for all who are interested, whose rights the courts will protect.

THIS suit was originally brought in the Court of Common Pleas of *Bucks* County, by *Lewis Reese* against *John Addams*, Esq., the prothonotary of the said county, for money had and received by the defendant for the use of the plaintiff. It was removed by *certiorari* to the Circuit Court, where it was tried on the 25th of *April*, 1827, before Judge DUNCAN. A verdict was given under

(Reese v. Addams.)

the direction of the judge, in favour of the plaintiff, for two thousand dollars. - A motion for a new trial having been overruled, an appeal was taken to this court.

On the 12th of *December*, 1810, *James Lewis* made his last will and testament, and among other things devised in fee simple to his sons *James* and *Curtis*, a tract of land in the county of *Berks*, charged with the payment of a legacy of four hundred pounds each, to his two daughters, *Eleanor* intermarried with *William Morris*, and *Abigail* intermarried with *Henry Loby*. The 30th of *January*, 1819, *James Lewis* conveyed his moiety of the property to his brother *Curtis*, and under an act of assembly, passed the 8th day of *March*, 1812, *Curtis Lewis* filed his petition to the judges of the Court of Common Pleas of *Berks* county, representing that the president, managers and company of the *Schuylkill* Navigation Company had caused dams to be erected in the river *Schuylkill*, by reason of which, considerable injury had been done to him, in consequence of the water having overflowed part of his land, &c., by which his improvements on the said land are injured, and in a great measure rendered useless, and part of his land *permanently* covered with water.

On this petition an inquest was awarded, and on the 31st of *March*, 1820, the inquest found "That they had gone to the premises in the river mentioned, and that they found that by reason of certain dams and other obstructions, erected in the river *Schuylkill*, by the president, managers and company, *Curtis Lewis* had sustained damages to the amount of two thousand five hundred dollars."

On the 15th of *April*, 1820, *Curtis Lewis*, under certain trusts and conditions, conveyed all his interest in these damages, to the plaintiff, *Lewis Reese*.

It appeared that there was a compromise, and the *Schuylkill* Navigation Company paid into the hands of *John Addams*, prothonotary of *Berks* county, the defendant, who was a mere stakeholder, the sum of two thousand dollars, which was admitted to be for the same land which was devised by *James Lewis* the elder, to his two sons, *James* and *Curtis*.

The cause was argued in this court, by *Hays*, for the plaintiff, who cited 1 *Vern.* 411. 2 *Vern.* 143 288. 2 *P. Wms.* 188. 2 *Dall.* 131, 243, 245. 6 *Binn.* 395. 3 *Yeates*, 294. 3 *Wheat.* 563. 2 *Yeates*, 261, 321. 6 *Binn.* 462. 1 *Serg. & Rawle*, 511. 7 *Serg. & Rawle*, 411.

Baird, contra, cited *Powell on Mort.* 232. 2 *Atk.* 107. 3 *Atk.* 204. 15 *Johns*, 205.

ROGERS, J. after stating the facts, delivered the opinion of the court, as follows:—

It has been properly admitted by the counsel for the plaintiff, that the legacies given by *James Lewis*, to his two daughters, are

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charges upon the land devised to *James* and *Curtis*, and it is also conceded that they still remain unpaid. The question is, who is entitled to the money, the legatees, who have the lien on the land, or *Lewis Reese*, the assignee of *James Lewis*, and whom I shall consider, for the purposes of this argument, as standing precisely in the same situation as his assignee, *James Lewis*. In order, correctly to determine this matter, it is necessary to consider what is the nature of the damages recovered in this case. By the 10th section of an act of assembly, passed the 8th of *March*, 1815, entitled, "An Act to incorporate a company, to make a lock navigation on the river *Schuylkill*," it is provided, "That if any persons shall be injured by any dam or dams being erected, and the president, managers and company cannot agree with the owner or owners; on the *compensation* to be paid for the injury, proceedings shall be had, as is directed in the 11th section of the act."

In the 11th section it is enacted, "That the president, managers and company shall have power and authority, by themselves or their superintendants, engineers, artists and watermen, to enter in and upon, and *occupy* all land which shall be necessary and suitable for erecting a lock, sluice or canal, doing as little damage as possible, and there to dig, construct, make and erect such lock, sluice or canal, *satisfying* the owner or owners thereof." If they cannot agree, the section points to the mode of proceeding which has been adopted in this case.

It is the duty of the jury to ascertain and report to the court, what damages, if any, have been sustained by the owners of the ground, by reason of the lock, canal or sluice passing through the land. They also *value* the land, and in doing so, take into view the advantage to the owner, from the said navigation passing through the land.

Where the injury to the premises is of a mere *temporary* nature, such as entering upon the contiguous land, taking and carrying away stone, gravel, sand or earth, the 12th section provides a different mode of proceeding. In such case, the company is directed to repair breaches, make amends for the damages, and pay for the materials taken away.

By a recurrence to the 10th, 11th and 12th sections, it will be seen that the legislature have carefully and wisely distinguished the case of a mere trespass or *temporary injury* to the freehold, from an *occupation* of the land, or an injury or privilege permanent as the land itself.

When the proceedings are under the 10th and 11th sections, the company become *pro tanto*, purchasers of the freehold occupied by them, or at least of a privilege, which, in judgment of law, may be co-extensive with, and permanent as the land itself.

Under the 12th section, it is a mere compensation for an injury done, and for materials, not attended with a permanent occupation of the premises.

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With these distinctions steadily in view, there is not so much difficulty in the determination of the important principle raised in this record. The damages were assessed under the 10th and 11th sections, and were intended as a *compensation* for the *land*, the price of the privilege of swelling water on the land of *James Lewis*, the devisee, who took the property, *cum onere*, charged with the payment of the legacies, to his two sisters. *James Lewis* became the owner of the fee simple, by the will of his father, and by the same instrument, his sisters became equally entitled to their legacies, charged on the land. The constitution declares, "That no man's property shall be taken, or applied to public use, without the consent of his representatives, and without just compensation being made." As the rights of *James Lewis* are protected by this clause of the constitution, with equal reason are we required to secure the vested rights of his sisters, who are equally the objects of the testator's bounty. In this case, the property has been taken under the authority of the legislature, upon a fair compensation being made by the company. They have substituted the money for the land, and can it be supposed that the legislature (if they had the power) intended to divest the vested rights of creditors, from a real security into a personal one. The injustice of this, is most manifest in the case now under consideration; the more so, by supposing a case which may readily occur. A. has a mortgage against B., on a house and lot, to nearly the value of the property. It is necessary that the canal should pass directly through the site of the house, and that it should be pulled down or removed. By the doctrine contended for by the defendants in error, the mortgagee would lose his security, and would have but a personal remedy against the mortgagor. This surely is not a sound construction of the act.

This differs from the case of an ordinary purchase; for there, the creditors would still have their lien on the land, in the hands of the purchaser. This being intended for public use, policy requires that the lien should be divested, but at the same time, not at the expense of any persons interested, who have the same lien on the money, that they had on the land itself.

The proceeding to obtain compensation, must be in the name of the owner or owners of the land, by the express words of the act of assembly. The company must look to them, it is true, and a payment by the company, to the devisee, would be a protection to them, for they are not bound to see to the application of the money, unless, perhaps, on express notice. That, however, is not the question. Here, the money is in *gremio legis*, and we have the lien creditors asking us to protect their rights, which will be absolutely destroyed, if the money be suffered to pass into the hands of the owner of the land, or his assignee.

The plaintiff demands the money, not as a trustee for the lien creditors, but with the intent to apply it to an entirely different

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purpose, under the trust and conditions of the deed of assignment.

In this view of the question, I am fortified by the case of the president, managers and company of the *Schuylkill* Navigation Company v. *Thoburn*, 7 *Serg. & Rawle*, 418. It was there decided, that none but the owner, or owners, can sustain the proceedings against the company. It also establishes the principle, that the proceeding, under the 10th and 11th sections, is for an injury done to the realty; that the finding of the jury is a compensation, or the price of a privilege to swell the waters to a particular height, for an indefinite time; it also expressly takes the distinction between a proceeding under the 10th and 11th, and under the 12th section of the act.

Although the owner of the land is the party, in whose name the suit should be carried on, yet it by no means follows, that he has the absolute control of it. He is a trustee, for the benefit of all persons interested. *Prima facie*, they would be bound by his acts; for it is presumed, that in protecting his own, he will also protect their interests. There is great convenience and policy, and indeed justice, in making the owners of the land, the persons with whom the contracts should be made, and in whose names, suits should be instituted. It prevents multiplicity of suits, while, at the same time, courts of justice will take care, that the rights of all who are interested in the proceeds of the land, shall be protected.

I understand, that the lien of the creditors will be much more than the two thousand dollars, in the hands of the prothonotary, so that under the principles laid down in the above opinion, there can be no difficulty in the distribution of the money. If there should be any conflicting claims among the lien creditors themselves, the court are not to be considered as intimating any opinion between them. We merely decide, that the plaintiff, *Lewis Reese*, is not entitled to the money.

Judgment reversed.

[LANCASTER, MAY 29, 1827.]

HEFFELFINGER *against* SHUTZ and others.

IN ERROR.

A deed is not evidence of actual possession according to the boundaries described in the deed.

Whether interlineations and erasures have been made in a deed before or after its execution, is a question for the jury to decide.

WRIT of error to the District Court of *Dauphin* county.

This case, so far as it could be understood from the record, was an ejectment brought in the court below, by *George, Elizabeth*, and

(Heffelfinger v. Shutz and others.)

Peter Shutz against *Peter Heffelfinger*, to recover three acres of land in *Hanover* township which the plaintiffs claimed under a warrant for one hundred acres in favour of *George Shutz*, dated the 2d of *March* 1752, and a survey thereon dated the 12th of *April*, 1775, of one hundred and ninety-four acres for *Leonard Shutz* in right of the said *George Shutz*. The question on the trial turned principally on an alleged possession by the plaintiffs and those under whom they claimed, of twenty-one years; and in making out their case, they offered in evidence a deed for the land in dispute from *John Shellenberger* to *George File*, dated *March* 7th, 1775, accompanied by the following evidence, to wit, a certificate from the recorder's office in *Lancaster*, stating that there is no deed on record there from *Leonard Shutz* to *John Shellenberger*, parol proof by the recorder of *Dauphin* county, that after diligent search no deed can be found on record in his office from *Leonard Shutz* to *John Shellenberger*; parol proof that diligent search has been made by the plaintiffs among their father's papers, and no such deed is to be found, and that the plaintiffs' father died more than thirty years ago, with parol proof that the plaintiffs or those under whom they claim, had uninterrupted possession of the premises in controversy for more than thirty years before the institution of this suit, and that this possession was of the same premises as those mentioned in the deed offered in evidence.

The defendant's counsel objected to the deed being read in evidence for any purpose. The court rejected it as evidence of title, but permitted it to be read to show the boundaries of the plaintiffs' claim and the extent of the occupation of the premises. The defendant's counsel excepted to the opinion, and the court sealed a bill of exceptions.

The next bill of exceptions was founded upon the court permitting *Barbara Shutz* to be sworn as a witness for the plaintiffs, after having been objected to by the defendant's counsel. There was nothing in the record to show on what ground the objection was made.

In the course of the trial a deed from *Martin Miller* and wife, to *Francis Fultz*, bearing date the 19th of *March*, 1794, was offered in evidence on the part of the defendant, and objected to by the plaintiff's counsel, because it contained interlineations and erasures which were unexplained. The court sustained the objection, and the defendant's counsel excepted to their opinion. The reporter regrets that no copy of this deed having come into his hands, he is unable to state more fully the evidence offered and rejected. This defect is, however, partially supplied by the judge who delivered the opinion of this court.

Several other bills of exceptions to evidence were returned with the record of this case; in which, and in the opinion of the court, twelve errors were assigned by the counsel for the plaintiffs in error. It is deemed, however, unnecessary to specify them.

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In the second bill of exceptions error was assigned in these words:

“The court permitted *Barbara Shutz*, widow and relict of *George Shutz*, deceased, under whom the plaintiffs claimed as heirs at law, mother of plaintiffs, and endowable of the lands if recovered, to be sworn as a witness in chief in the cause.”

Roberts, for the plaintiff in error.

Elder, for the defendants in error.

The opinion of the court was delivered by

DUNCAN, J.—If the deed from *John Shellenberger* to *George File*, of the 7th of *March*, 1775, for the lands surveyed on *George Shutz's* warrant on the 2d of *March*, 1752, accompanied with evidence of possession of the general tract, had been received as evidence of title it would have been proper testimony; but as the question, so far as the record shows us, was one of actual possession of the small piece of land, for which the ejectment was brought, and was received as evidence of occupation of the *locus in quo*, I am of opinion, that for that purpose it was not evidence; the occupation for twenty-one years. It could not be proved by the proof of the boundaries. The survey showed the boundaries, and was the best evidence of its limits.

The third bill of exceptions is, in substance, the same as the first. The question attempted to be raised on the second bill of exceptions, the admission and competency of *Barbara Shutz*, does not appear by the record; for the exception discloses no other objection to the competency of the witness, than that her name was *Barbara Shutz*. It is not alleged that she was in any way connected with the title of the plaintiffs, or that if they recovered, she would be endowable. The error assigned first discloses the circumstance of her being the widow and relict of *George Shutz* under whom the plaintiffs claim. But the record shows no such fact; if it had, the witness could not have been received without a release.

In the rejection of the conveyance of *Martin Miller*, who had obtained a patent for the land under which defendant claimed, there was error. The ground of absolute rejection, the execution of the deed being acknowledged on the day of its execution, was, that it contained interlineations and erasures, which were unexplained to the court. The execution of the deed being proved, it should have gone to the jury; the explanation should have been made to them. The interlineations or erasures were a question of fact for the jury. The presumption may be in the first instance that the interlineation was after its execution, but this might be removed by very slight circumstances; and indeed where the alteration is against the interest of the grantee, it would of itself counterbalance that presumption and give rise to another and a stronger presumption, that it was done at the time of execution. Now, here,

(Heffelfinger v. Shutz and others.)

the insertion of the crowded line in a different hand-writing from the body of the deed, is the erasure or alteration, which, it is alleged, should avoid the deed. The deed, as it originally stood, was a conveyance of the whole tract, but when it came to be executed, the mistake of the scrivener was discovered. The exception of six acres before sold and surveyed off to *Adam Dunn*, was then introduced by the parties; and that is apparent by the intrinsic evidence, the inspection of the deed itself. The deed was left in an unfinished state in another hand, but evidently in the same hand which wrote the line, "except the six acres." It was concluded, and the month left in blank then filled up. The important covenant of warranty, the last covenant in the conveyance, was left open for insertion when the deed was to be executed and delivered, and it was so done. This would have been sufficient to repel the presumption of subsequent alteration, which would vitiate the instrument. This, on inspection, would have explained the fact to the jury, without requiring any extrinsic evidence, for the instrument itself contained the evidence, viz. the ocular demonstration. The case of *Prevost*, indorsee of *Croghan*, v. *Gratz*, 4 *Wheat.* 502, shows that the presumption of interlineation being subsequently made, is not a strong one. There the account of sales of *Croghan's* lands was of a sale made to one *Howard*, in 1775. The word *Howard* was crossed out with a pen, but so that it was perfectly legible; and the name of *Michael Gratz*, in his own handwriting, written upon it. Yet the court presumed that the alteration was made with the consent of *Croghan*; that the sale to *Howard* was abandoned, and *Gratz's* name inserted with consent; presumption made in favour of innocence, even where the alteration was in favour of the person in whose handwriting it was. But, here, the alteration is not in favour of the party, but of the person who filled up and finished the deed; and, instead of increasing, it diminished his interest. The conclusion is inevitable, that it was before execution, because there could be no motive which could influence the grantee to make it subsequently. In this likewise there was error.

All the other exceptions are frivolous, but the plaintiff in error has sustained his exceptions in the second and fourth bills of exceptions; viz. the admission of the deed from *John Shellenberger* to *George File* as evidence, not of title, for that it was good evidence accompanied with the long possession of the general tract, but it was not evidence to prove the extent of his actual occupation, and the rejection of the deed from *Martin Miller* to *Jacob Shutz*.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, MAY 29, 1827.]

The FARMERS' BANK of Reading *against* BOYER and others.

IN ERROR.

The omission of the words, "*and generally to abide all orders of the said court,*" prescribed as part of the condition of the bond, to be given by a petitioner for the benefit of the insolvent laws, by the first section of the supplemental act of the 28th of *March*, 1820, does not vitiate the bond, as respects either the principal or sureties; and it is immaterial that the parties recite, in the introduction to the condition, that the bond was given to comply with the requisitions of an act of assembly which has been repealed.

THIS cause was tried at a Circuit Court held in *Berks* county in *May* last, before His Honour Judge DUNCAN. The jury returned a verdict in favour of the plaintiff for five hundred and three dollars and thirty-four cents, a motion was made by the defendants for a new trial, which being overruled, they entered an appeal.

The action was brought by the *Farmers' Bank of Reading* against *John K. Boyer*, *Henry Bowman*, *Joseph Shing*, and *John Adams*, on a bond dated the 3d of *December*, 1823, of which the following was the condition:

"Whereas the above bounden *John K. Boyer*, hath been arrested and is now in custody, at the suit of the said *Farmers' Bank*, for the sum of three hundred and twenty dollars and sixty-five cents, besides costs, and the said *John K. Boyer* having made application to *William Witman*, jr., one of the judges of the Court of Common Pleas, to be released from such confinement on his entering into bond with sufficient security to comply with the provisions of the act of the general assembly of the commonwealth of *Pennsylvania*, passed the 29th of *January*, A. D. 1820, entitled a supplement to the act entitled, 'an act for the relief of insolvent debtors,' and the said *William Witman* having approved of the above named *Henry Bowman*, and *Joseph Shing*, and *John Adams*, esq., as a security for the said *John K. Boyer*.

"Now the condition of the obligation is such, that if the said *John K. Boyer* shall appear before the Honourable the judges of the Court of Common Pleas for the county of *Berks* at the next term of the said court, to be holden on the first Monday of *January* A. D. 1824, and then and there remain and abide the final order of the said court to be made during the said term, and then and there surrender himself to prison, in case on his appearance before the said court he shall not comply with all things required by law to procure his discharge from confinement, then the above obligation to be void, otherwise to be and remain in full force and virtue."

The defendants pleaded conditions performed. but it was agreed

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that if the Supreme Court should be of opinion that upon any plea which the defendants could legally enter, they could avail themselves of the fact that the act of the 29th of *January*, 1820, had been repealed when the bond was executed, then the judgment to be reversed and a new trial had upon new pleading.

Baird, for the plaintiffs.—The bond on which this suit is brought, is declared to have been taken under the act of the 29th of *January*, 1820, and the condition is in exact conformity to the provisions of that act. But the act had been repealed before the execution of the bond, which was therefore void. The only act in force at the time was that of the 28th *March*, 1820, which required a very different condition in the bond, from those required by the act which had been repealed. Part of the required condition, was, that the petitioner should “generally abide all the orders of the court;” a condition wholly omitted in the bond in question. A statutory bond is void, if it do not follow the statute. 1 *Plowd.* 62. 19 *Johns.* 233. 13 *Serg. & Rawle*, 190.

Smith, *contra*, answered, that the terms of the bond complied substantially with the act of the 28th of *March*, 1820, which was sufficient.

The opinion of the court was delivered by

GIBSON, C. J.—It is admitted that a bond whose terms are not in accordance with the provisions of a statute by which it is required, is void, but this is to be restrained to cases where the condition is to do something which the statute does not require, or where it contains a provision which the statute does not authorize. This bond was avowedly framed to meet the exigencies of the second section in the supplement of the 29th of *January*, 1820, which had been repealed and supplied by the further supplement of the 28th of *March* in the same year. The condition is, that *Boyer* should appear before the judges of the Common Pleas, “and then and there remain and abide the final order of the said court, to be made during the said term, and then and there surrender himself to prison, in case on his appearance before the said court, he should fail to comply with all things required by law to procure his discharge from confinement.” By the first section of the further supplement, which happened to be the only act on the subject in force when the bond was executed, the condition prescribed is that the debtor appear at the next court, “then and there to take the benefit of the insolvent laws, and to surrender himself to the jail of the county if he fail to comply with all things required by law to entitle him to be discharged, *and generally to abide all orders of the said court.*” From this it is perceived that the condition of the bond given by the defendants is not as large as the terms of the act, inasmuch as it does not contain a stipulation, that the debtor shall generally abide *all* orders of the court. I hold it to be immaterial that the parties recite, in the introduction to the condition, that the

(The Farmers' Bank of Reading v. Boyer and others.)

instrument is intended to produce a compliance with the provisions of the act of the 29th of *January*: it is sufficient, if it be a substantial compliance with the act of the 28th of *March*. In what does it differ from the bond prescribed in the latter? In nothing but the requisition to abide all orders of the court. But that, had it been inserted, would have increased the responsibility of the obligors; and what right have they to complain of its having been omitted? The legislature directed it to be inserted, not for the benefit of the obligors, but of the creditors; and any one can dispense with a provision introduced for his own benefit. The creditors, who alone had a right to complain, are content; and it would be carrying the doctrine of conformity to legislative provisions to a most unreasonable extent, were we to permit the party who has benefited by the variance, to set it up as a bar to liability. Could the variance have been urged as an objection to the debtor's discharge, it would have been fatal to the action here; but it was held in *Lincoln v. Williams*, (12 *Serg. & Rawle*, 105,) that the bond being designed to secure the debtor's attendance at court, cannot enter into his title to be discharged. Nor does the surety stand on more advantageous ground than the principal. A variance of this sort, where it is available at all, may be pleaded at law, and it therefore affords no room for the extraordinary interference of a chancellor. But it was held in *Wolverton v. The Commonwealth*, (7 *Serg. & Rawle*, 278,) that a surety can avail himself of no defence at law, which would not equally avail the principal; and, in *Simms and Wise v. Slacum*, (3 *Cranch*, 299,) the case was ruled without reference to any supposed distinction between the defendants in the court below. We therefore fully concur with the direction given by the judge who tried the cause, that the omission of the particular clause in the condition was not sufficient to avoid the bond.

Judgment of the Circuit Court affirmed.

[LANCASTER, MAY, 1827.]

BARNETT *against* BARNETT.

IN ERROR.

Where, in an action of dower, the defendant pleaded defectively, an agreement before marriage in lieu of dower, and a recovery thereon by the plaintiff, and the plaintiff replied, denying the facts set forth in the plea, and concluding to the country, and the defendant demurred to the replication, and the court below entered judgment for the plaintiff on the demurrer: *Held*, that in this judgment there was no error.

In an action of dower, the record of the suit, founded upon an alleged agreement entered into before marriage, upon which a recovery was had, is not evidence for the defendant, without producing the agreement itself, or proving its loss and contents.

But *it seems*, that, if the loss of the original agreement were proved, the recital of it in the record, by the plaintiff, might, as far as it went, be evidence against her of the contents of the agreement.

If, in an action of dower, the jury find "for the plaintiff, her dower as stated in the declaration," and the court thereupon enter judgment that a writ of seisin and inquiry of damages issue, the plaintiff may release all but the judgment to recover seisin, and that may stand.

THE defendant in error, *Margaret Barnett*, widow of *Thomas Barnett*, deceased, brought this action of dower under *nihil habet* against *Frederick Barnett*, the plaintiff in error, in the District Court of *Dauphin* county, from which it was removed to this court by writ of error.

Among other pleas, the defendant pleaded, "that the said *Margaret* ought not to have and maintain her suit against the said *Frederick*, for this that she the said *Margaret*, whilst sole, in consideration of a marriage which was about to take place between her, the said *Margaret*, by the name of *Margaret Wingert* of the one part and *Thomas Barnett* of the other part, on the 26th of *March*, 1804, contracted and agreed with each other that if the intended marriage should take effect, and he the said *Thomas* should live ten years from that time, that he the said *Thomas* would pay to the said *Margaret* four hundred pounds of lawful money of *Pennsylvania*, in full and lieu of her dower or thirds of his estate; and the said *Thomas* then and there signed and sealed the said agreement, and the said *Margaret* accepted thereof as the marriage contract entered into by her the said *Margaret* and the said *Thomas*; and the said *Frederick* avers, that in consideration thereof the marriage was afterwards solemnized, to wit, on the same day and year aforesaid, and the said *Thomas* did live ten years from and after the solemnization of the said marriage, to wit, until the 14th of *April*, in the year of our Lord 1813; and the said *Frederick Barnett* avers, that after the death of the said *Thomas* the said *Margaret*, afterwards, to wit, to the term of *November*, A. D. 1814, in the Court of Common Pleas in and for the county of

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Cumberland, in the state of *Pennsylvania*, she the said *Margaret* prosecuted an action of covenant on the marriage contract aforesaid against *George Barnett*, Adm., of the goods, chattels, &c., of the said *Thomas Barnett*, deceased; on which said suit she the said *Margaret*, at the term of *April*, recovered a final judgment for the sum of one thousand four hundred and forty dollars, as by the record of the said court hereunto annexed more fully appears.

“Wherefore the said *Frederick* prays judgment if the said *Margaret* ought to have or maintain her said action thereof against the said *Frederick*. With this that the said *Frederick* will verify that the same *Margaret* is the plaintiff in this action and not other or a different person.”

The plaintiff replied, that she “ought to have her dower of the lands and tenements with the appurtenances by the endowment of him her said husband, the said *Thomas Barnett*, because the facts set forth in her declaration in this suit are true; and because all and singular the matters stated and set forth by him the said *Thomas Barnett*, the defendant, in his foregoing plea, with the averments therein contained, are false and unfounded throughout, and this the said *Margaret* prays may be inquired of by the country.”

To this replication the defendant demurred, because it did not contain matter pertinent to the said plea, and because the only replication to the plea of a former recovery, is *nul tiel record*.

The court below gave judgment for the plaintiff on the demurrer; and in this there was error assigned.

On the trial, the defendant offered in evidence the record of an action of covenant, brought by the said *Margaret Barnett* against *George Barnett*, administrator of *Thomas Barnett*, deceased, in the Court of Common Pleas of *Cumberland* county to *November* Term, 1814. In this case two declarations were filed; the first of which contained two counts, upon an agreement under seal, the 26th of *March*, 1804, entered into between *Thomas Barnett* and *Margaret Wingert* before their marriage.

The second declaration also contained two counts, the first of which was upon a sealed agreement bearing date the 29th of *March*, 1804, entered into by *Thomas Barnett* and *Margaret Wingert* before their marriage, by which the said *Thomas* acknowledged himself to be bound to the said *Margaret* in the sum of four hundred pounds, to be paid to her, provided the said *Thomas* should live ten years from that time. It averred, that he did live ten years from that time, and afterwards, viz. on the 10th of *April*, 1814, died, leaving the said *Margaret* to survive him.

The second count set forth, that a marriage being in contemplation, between the said *Thomas* and *Margaret*, then *Margaret Wingert*, it was covenanted by certain articles of agreement, under seal, entered into between them, dated the 29th of *March*, 1803, that the said *Thomas*, his executors and administrators, in consideration of the said marriage, should pay to the said *Marga-*

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ret, the sum of 400 pounds, provided the marriage should take place, and the said *Thomas* should live ten years from the time of the marriage, leaving the said *Margaret* to survive him. Then followed averments, that the said marriage did take place on the 29th of *March*, 1803, and that the said *Thomas* did live ten years from that time, and afterwards, viz., on the 10th of *April*, 1814, died, leaving the said *Margaret* to survive him.

Each count contained an averment of the loss of the agreement, from time or accident.

The admission of this record was objected to by the plaintiffs' counsel; the court sustained the objection, and sealed a bill of exceptions.

Several other bills of exceptions to evidence, were returned with the record, all of which were abandoned on the argument, in this court.

The jury having found a verdict "for the plaintiff, her dower, as stated in her declaration," the court gave judgment, "that a writ of seisin and inquiry of damages issue." In this judgment, error was also assigned.

Fisher, for the plaintiff in error, contended,—1st. That the record ought to have been admitted. Though not expressly so stated, the jury might have presumed, that the settlement on which a recovery was had, was in lieu of dower. Provisions of this sort are frequently taken to be so, by implication, and whether it was so, or not, was a matter for the jury to determine. 1 *Madd.* 369, 370. 1 *Halls' L. Journ.* 450. 10 *Johns.* 31. 5 *Serg. & Rawle*, 309.

2. The judgment for damages was erroneous, the jury not having found, that the husband died seised. 3 *Yeates*, 38.

3. The judgment on the demurrer was wrong.

Elder, contra, stated,—that as to the judgment, the plaintiff below would release the damages, and let the judgment stand for seisin alone.

The record, he said, was properly rejected. The articles, and not the record, were evidence of the contract, and if they were not produced, then evidence should have been given of their loss, and their contents proved, in the ordinary way. The contract, and not the recovery, constituted the bar, whether suit was brought on it, or not. Besides, the record offered in evidence, was not the record set out in the plea. Two declarations were filed, on distinct contracts, of different dates. 2 *Bl. Com.* 136, 7.

The opinion of the court was delivered by

HUSTON, J.—In this action of dower, brought by *Margaret Barnett*, widow of *Thomas Barnett*, against *Frederick Barnett*, several pleas were pleaded, and issues thereon to the country. There was also a demurrer to a replication of plaintiff, which was decided in favour of plaintiff below.

There were also several bills of exception to testimony, all of

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which, except one, were abandoned in this court; and error was assigned in entering the judgment.

After several other pleas, the defendant pleaded in substance, that before the marriage of *Thomas Barnett* with the plaintiff, then *Margaret Wingert*, on the 26th of *March*, 1804, an agreement was entered into between them, and executed under the hand and seal of the said *Margaret*, by which it was stipulated, "that if the said marriage should take effect, and if the said *Thomas* should live ten years from that time, that he would pay her four hundred pounds in full, and in lieu of her dower, and, that she agreed to and accepted the same in full of her dower, or third part of his estate; and said *Frederick* averred, that said *Thomas* did live ten years from the date of said marriage, viz., until the 14th of *April*, 1813. And *Frederick* further averred, that after the death of the said *Thomas*, the said *Margaret*, at *November Term*, 1814, instituted a suit against his personal representatives in *Cumberland* county, on the said agreement, and recovered the sum of one thousand four hundred and forty dollars from the estate of the said *Thomas*, as appeared by the record produced.

The plaintiff replied to this plea, to which the defendant demurred. The demurrer was decided for the plaintiff, and rightly. The replication took issue on all the facts. The defendant, however, alleged that to that part of the plea which stated the record of the suit in *Cumberland*, the only replication was *nul tiel record*. It is, however, apparent that although the plea stated as well the agreement as the suit on it, yet the bar, if any, arose from the agreement; and that the agreement and suit on it, the two facts put together, made but one plea. Besides, the plea itself was in more respects than one defective; and, as on demurrer you go back to the first error, the judgment must have been for the plaintiff.

On the trial the defendants offered this record in evidence. The narr. set out an agreement very different from that stated in the plea, and concluded by averring that the agreement was destroyed by time or accident. This record was objected to, and rejected by the court below, and rightly. The defendant, if he would not produce the agreement, ought to have proved that it existed at one time, that he had made inquiry for it, and could not find it, and then perhaps the recital made of it by the plaintiff herself in her suit in *Cumberland* might have been properly offered and read, to prove, as far as it went, the contents of it. From the notice of the paper, it was as much to be expected that the paper, or a counterpart of it, should have been kept by *Thomas Barnett*, as by the plaintiff, and search for it, by his personal representative, was necessary, and proof that it could not be found, in order to make out the plea of the defendant; for, I repeat it, if there was a defence, it arose on the article and not on the suit. The narr. did not state the agreement to contain any clause, by which she agreed to relinquish her dower.

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The verdict found for the plaintiff her *dower*, as stated in the declaration. The judgment was entered, that writ of seisin and inquiry of damages issue.

At common law there were no damages in dower. By the statute of *Merton*, (20 H. 3, c. 1,) it was enacted, "That if a widow shall recover her dower of lands whereof her husband *died seised*, the tenant shall yield the damages, that is to say the value of the land from the time of the death of the husband, until the day she shall have judgment to recover seisin." And the statute of *Gloucester* gives costs in all cases where the party is entitled to recover damages.

It is most usual for the jury who tries the cause, to find all the matters necessary to end the contest between the parties, and it must find the fact that the husband died seised, if he did so die: the time of his death, the value of the lands, and assess the damages on account of the detention of her dower, and costs; (see the form of verdict, 2 *Saund.* 331; *Dennis v. Dennis*, *Bul. Ni. Pri.* 116:) and she then has judgment to recover seisin of the third part of the premises, by metes and bounds, and the mesne profits and damages. If, however, the husband did not die seised, the jury ought to find it so expressly; or, where the jury do not find all the necessary facts, the omission may be supplied, generally, by a writ of inquiry. It might be doubtful,—if a jury found for plaintiff, and damages and costs, but omitted to find that husband died seised,—whether a writ of inquiry would supply the defect; but the party may remit the value of land from death and damages.

As the damages and costs are added by the statute to the judgment at common law to recover seisin, the judgment to recover seisin may be affirmed on a writ of error, and the rest of the judgment reversed, and a writ of error lies after judgment of seisin and before writ of inquiry and judgment thereon for damages. 2 *Saund.* 43. *Williams v. Guiger*, 3 *Yeates*, 000.

In this case the plaintiff has released all but the judgment of seisin. There is then no error, and the judgment for seisin is affirmed.

Judgment for seisin affirmed.

[LANCASTER, MAY 29, 1827.]

HILLS and another *against* ELLIOTT and another.

IN ERROR.

Scire facias upon a claim filed under the lien law against two; and award of arbitrators against both. One entered an appeal and pleaded alone. On the trial, the jury were sworn as to both, and the one who had not appealed moved the court to dismiss the jury in consequence of the mistake, which was refused. A verdict was given against both defendants, and the one who had appealed prosecuted a writ of error. *Held*, that he could not assign, as error, the mistake in swearing the jury.

On the trial of a *scire facias* suit, founded upon a claim filed under the lien law, the claim cannot be *read in evidence* to the jury.

Unless materials be furnished on the credit of a particular building, they constitute no lien upon such building, notwithstanding they may have been used in its execution.

WRIT of error to the Court of Common Pleas of *Dauphin* county, in which the case was a *scire facias* filed upon a claim under the mechanics' lien law, by *John* and *Daniel Elliott*, the defendants in error, against the plaintiffs in error, *John A. Hills*, undertaker, and *John Buffington*, owner of a certain building.

The cause was argued in this court by *Harris* and *Douglas*, for the plaintiffs in error, and by *Roberts* and *Fisher*, *contra*; after which the opinion of the court, in which the whole case is sufficiently stated, was delivered by

HUSTON, J.—*John* and *Daniel Elliott* filed in the office of the prothonotary of *Dauphin* county a claim for materials, as follows:

“*John A. Hills*, undertaker, and *John Buffington*, owner of the building, debtor to *John* and *Daniel Elliott* of the city of *Philadelphia*, material men,—for glass and paint, and materials furnished and delivered to *John A. Hills* on the 1st of *July*, 1822, for erecting and constructing a certain three-story brick, &c. (describing it very precisely,) and now in the possession of *John Buffington* aforesaid, viz.—

48 Lights, (Eng. Crown Glass,) 17 by 12	at 45 cts.	\$19,60
Breakage of this size, 4 ditto		1,80
40 Lights, (Chelmsford Glass,) 17 by 12		8,40
70 ditto, (French,) 16 by 13	at 22 cts.	15,40
20 ditto, (Chelmsford,) 16 by 11	at 17 cts.	3,41
20 ditto, (ditto,) 15 by 11	at 16 cts.	3,20
12 ditto, (ditto,) 13 by 11	at 15 cts.	1,80
96 ditto, (French,) 15 by 12	at 18 $\frac{3}{4}$ cts.	18,00
48 ditto, (Hamburg,) 8 by 10	at 50 cts. pr. doz.	2,00
100 lbs. of White Lead, - - -	- - -	12,77
Package and Portrage, - - -	- - -	4,81

 \$91,18

(Hills and another v. Elliott and another.)

"Please to enter a lien on the property above described, in the Court of Common Pleas of *Dauphin* county, for the sum of ninety-one dollars and eighteen cents, being the amount of the bill above stated. *John Roberts*, for *J. and D. Elliott*.

"*Thomas Walker*, Esq., Proth.

"Filed Dec. 30th, 1822."

A *scire facias* issued on this claim—an arbitration took place; an award was made for the plaintiffs, and an appeal entered by *Buffington*, who alone pleaded; and, on issue joined, a jury were sworn inadvertently, I suppose, against both defendants. After the cause had progressed some time, Mr. *Elder*, as counsel for *Hills* alone, moved the court to dismiss the jury—they having by mistake been sworn as against *Hills*: the court refused to do so: then writ of error is taken out and prosecuted by *Buffington* alone: neither *Hills* nor his counsel interfere. To be sure it was singular to swear the jury in that way; and if *Hills* had been injured or complained, it might have required consideration, but *Buffington* is not injured, and we do not sit to reverse for every trifling irregularity or oversight, especially where no injury is done. The verdict and report of arbitrators are each for the amount of the plaintiffs' claim.

After the jury were sworn, "the counsel for the plaintiff, in order to support the issue on his part, offered to read in evidence to the jury the lien filed by the plaintiff in this cause," (prout, &c.) This was objected to, and admitted, and a bill of exceptions sealed. I was disposed to get over this by supposing it was merely offered to read it as a specification of the plaintiffs' claim—not as evidence of the sale and delivery of the articles—not as evidence at all—but as that to which the evidence to be given was to apply. But the record will not bear this construction: it was offered and received as evidence to the jury. Now, it was no evidence that such articles were furnished, nor of the sale and delivery of any of them; and could only be shown as a narr. or statement of the plaintiffs' claim, to which the evidence of sale and delivery was to apply. There is error; therefore in receiving this *as evidence to the jury*.

The plaintiffs then offered to read to the jury a letter of *J. A. Hills* to the defendants, dated *Harrisburg*, June 20th, 1822, as follows:

"DEAR SIR—I received your favour of the 17th instant, in which you mention the prices of crown glass. I shall want glass, the sizes as follows:—

708 Panes,	-	-	-	-	12	by	17	Crown.
40 Ditto,	-	-	-	-	12	by	17	American.
350 Ditto,	-	-	-	-	12	by	16	Ditto.
324 Ditto,	-	-	-	-	12	by	15	
12 Ditto,	-	-	-	-	11	by	13	
20 Ditto,	-	-	-	-	11	by	16	
20 Ditto,	-	-	-	-	11	by	15	
Two Boxes.	-	-	-	-	8	by	10	

(Hills and another v. Elliott and another.)

"The *American* is good enough for the upper stories, and is much cheaper, I expect. Mr. *North* says from twelve to fourteen dollars per hundred feet. You will endeavour to put the glass as low as possible. Inform me of the price of white lead, as I shall want several hundred weight." Nothing further in this letter. In another, of the 28th of *June*, he says,

"I shall want the glass next week. The buildings I have to complete by the 1st of *November*, and in the last of the same month I shall be in the city; but, if you want the cash before, you can have it by dropping me a few lines."

In another letter he acknowledges the receipt of the glass and the white lead; but nothing is said as to what buildings, or whose buildings he was erecting.

The book of the plaintiff, or rather a copy duly proved, was offered in evidence; in which, under date of *July 2d*, 1822, is entered, "*John A. Hills*, of *Harrisburg*, debtor." And then follow entries of glass of different descriptions by the box, according to the above bill, and two hundred and twenty-five pounds of white lead, and cotton for package to the amount of twelve dollars and sixteen cents, and portorage; amounting in all to two hundred and fifty-five dollars and seventy cents.

These were severally objected to and admitted, and bills of exception taken and sealed. I shall take them together, as the same objection applies to all. It is, that the evidence does not correspond with or support the claim; that the materials do not appear to have been furnished for this or any other particular house; it only proves a sale to *Hills* on his own credit, and would not, if admitted, make out a case on which the plaintiffs could recover. The act of the 17th of *March*, 1806, is not penned with such precision as to preclude all difficulty in applying it to the several cases which arise. "Every house shall be subject to the payment of debts contracted for, or by reason of any work done, or materials found and provided by any brickmaker, &c. or any other person or persons employed in furnishing material for, or in erecting and constructing such house." In *Hinchman v. Graham*, 2 *Serg. & Rawle*, 170, the late Chief Justice filled up the ellipsis in the last clause of the sentence, by inserting the word used, or, *used in the erecting*, &c. Few men feel more respect for that judge than I do; but in this case the attention of the court was drawn to the previous clause, *furnished for*, &c. By referring the last clause to the words *persons employed*, the sense is complete without the insertion of any word, persons employed in furnishing materials, or in erecting, or employed in erecting.

A lumber merchant purchases on credit one hundred thousand feet of boards, to sell and make profit. He changes his intention, and erects two or three houses, and uses half of the boards therein. If his creditor for this lumber, has a lien on those houses, he has

(Hills and another v. Elliott and another.)

what neither himself, nor the buyer, nor as I believe the legislature, ever intended.

A storekeeper purchases in *Philadelphia*, in the usual course of his business, glass, locks, hinges, nails, &c.: he erects a house or houses; the merchant was not intended to have a lien on those houses, for the price of so much of those articles as may be used.

If *John Buffington* before he paid *Hills*, had gone to *Philadelphia*, and inquired of Messrs. *Elliott* and inspected their books, he would have found nothing affecting him or his house; probably they had never heard his name: unless we hold that if a mechanic has an open account with a merchant, the balance of that account can be made a lien *pro tanto* on every house in which a pane of glass, a lock, or a hinge was used.

The materials must be furnished on the credit of a particular house; such must be the understanding at the time. The charges must be made in such a manner, that the owner, if he applies to the material man before he pays the architect, may be able to discover the liability of his house. The law fixes the lien on the sale and delivery of the goods for a particular house, unless perhaps in case of fraud.

In the present case, I would say that the judge might have received all the facts in evidence, and then have given his opinion to the jury, that on those facts a lien was not created; or, he might have said the account offered in evidence was not the one filed, and rejected it. I would prefer the first mode of proceeding. I do not approve of the mode of trying causes on bills of exceptions to testimony, though if the whole evidence will not make out a case for the plaintiff, the court may reject it. The jury are sometimes misled by such evidence, and it wastes time; these are the objections to admitting the evidence. But still I would admit it, excepting a case where it did not apply to and conform to the narrative and statement.

In this case, the error seems to have originated in considering the claim filed as evidence of the facts contained in it: it was no evidence at all: it was that to which the evidence was to apply.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, MAY 29, 1827.]

KEAN *against* RIDGWAY and another.

IN ERROR.

The Orphans' Court decreed land of an intestate taken at the valuation, to J. K. in right of his wife (who was one of the heirs) to hold to the said J. K. and his wife, and the heirs of his wife. The wife takes only her undivided share in the land, as she inherited from the intestate.

The husband's recognizance in such case does not bind the wife's estate.

If the wife's interest in other portions of the land so decreed and taken, has been divested by decree of the Orphans' Court, or her conveyance, she cannot come upon the remaining land in the hands of a *bona fide* purchaser for more than her original undivided interest.

WRIT of error to *Dauphin* county, in an ejectment for one hundred and sixty-three acres of land, brought by *Jane Kean*, who survived her husband, *John Kean*, the said *Jane* being one of the daughters and legal representatives of *John Hamilton*, deceased, who died intestate, against *Jacob Ridgway* and *Nicholas Bressler*.

The jury empannelled in the court below for the trial of the cause, returned a special verdict, of which the following is the substance:—

John Hamilton died intestate, prior to the passage of the intestate act of 1794, (at which period, the oldest son of an intestate took two shares of his estate,) leaving a widow and six children; namely, *Jane*, intermarried with *John Kean*, *Martha*, intermarried with *James Alricks*, *John*, *Hugh*, *Margaret*, and *Catharine*. On the 7th of *October*, 1801, four persons appointed by the *Orphans' Court*, made a report that they had valued the several parcels of the real estate of the deceased, situate in *Dauphin* county, and the court, therefore, decreed two several parts thereof to *John* and *Hugh*, two of the children of the intestate. The guardians of the other children relinquished the right to take the residue of the real estate in *Dauphin* county, at the appraisement, to *John Kean* and *Jane*, his wife, who was the eldest daughter of the intestate.

On the 27th of *October*, 1801, *John Kean* petitioned the *Orphans' Court*, that he might be permitted "to take the residue of the real estate not taken by the other heirs, situate in *Dauphin* county, in right of his wife, at the valuation." The court decreed "That the said *John Kean*, in right of his wife, do, on paying or securing to be paid, the several and respective shares of the widow and other children of the said deceased, of and in the valuation or appraisement of the plantation, including, &c., to hold the same to him the said *John Kean* and *Jane*, his wife, and the heirs of the said *Jane* as fully and truly as the said *John Hamilton* had

(Kean v. Ridgway and another.)

and held the same in his lifetime." *John Kean* entered into a recognizance with three sureties approved by the court, conditioned for the payment of their respective shares of the valuation money to the widow and children of the intestate.

To *May* term, 1812, an action of debt was instituted on this recognizance in the name of the President of the *Orphans' Court* of *Dauphin* county, at the instance of *Moses McLean* and his wife, in which judgment was rendered against the defendants on the 7th of *September*, 1812. A *fieri facias* issued returnable to *November* term, 1812, and was levied on the land in dispute, which was condemned. A *venditioni exponas* issued to *February* term, 1813, and the sheriff having returned that the land remained unsold, an *alias venditioni exponas* issued to *May* term, 1813, on which the premises were sold to *George Wienman*, for nine thousand six hundred and forty-three dollars and thirty-one cents. On the 17th of *May*, 1813, the sheriff acknowledged a deed for the premises to the purchaser.

George Wienman and wife, by deed dated *October* the 9th, 1813, conveyed the premises to *John Newbold*, to whom *John Hamilton*, *Hugh Hamilton*, *Moses McLean*, and *Catherine Hamilton*, executed releases. *Newbold* and wife, by deed dated the 21st of *January*, 1818, conveyed to *Henry Shriver*, who with his wife, by deed bearing date the 9th of *February*, 1818, conveyed to *Jacob Ridgway*, one of the defendants. *James Alricks* and *Martha* his wife released their interest in the premises to *John Kean*, on the 22d of *November*, 1806, and on the 14th of *January*, 1806, *John Hamilton*, *Hugh Hamilton*, and *Robert Harris*, guardians of *Margaret Hamilton*, and *Catherine Hamilton*, released their interest to *John Kean*, in one hundred and twenty acres and one hundred and twenty-nine perches; part of the premises, and on the same day they released to *George Fisher*, esq., one hundred and twenty acres and one hundred and twenty-nine perches, part of the lands of the intestate.

At *May* term, 1813, a feigned issue was joined, in which *John Hamilton*, *Hugh Hamilton*, *James Alricks*, and *Martha*, his wife, *Moses McLean*, and *Margaret*, his wife, and *Catherine Hamilton*, were plaintiffs, and *John Kelker*, esq., sheriff of *Dauphin* county, defendant, with notice, &c. The object of this issue was to ascertain to how much, if any of the money in the sheriff's hands, arising from the sale of the real estate of *John Kean*, under the *venditioni exponas*, above referred to, the plaintiffs were entitled. On the 7th of *December*, 1813, the jury found a verdict for the plaintiffs; on which auditors were appointed, who made a report, exhibiting a general statement of the respective claims of the plaintiffs in the issue, to the money in the hands of the sheriff, and an apportionment of the sums due to each of the heirs of *John Hamilton*, deceased, from *John Kean*, was made of the property taken by him under the decree of the *Orphans' Court*. The

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statement exhibited also, the payments made by *John Kean*, to the heirs of *John Hamilton*, who, on receiving the balance due to them respectively, were to release their interests in the property sold by the sheriff. These balances were received, and releases executed accordingly.

John Kean on the 12th of *February*, 1810, mortgaged the premises for eight thousand dollars to the *Philadelphia Bank*, whose assignee received from the sheriff the sum of four thousand nine hundred and ninety dollars and sixty-seven cents, a portion of the proceeds of the sale.

Besides the premises in dispute, *John Hamilton* left other real estate in *Dauphin* county, and in *Cumberland* and *Mifflin* counties, parcels of which were taken under at their appraised value, by the different heirs, under decree of the *Orphan's Court* of the different counties.

John Kean died in the month of *December*, 1818.

Upon the facts set forth in this special verdict, the court below delivered an elaborate opinion, the substance of which, briefly stated, was, that the estate which descended to *Jane Kean* from her father, was not divested by the proceedings and decree of the *Orphans' Court*, so far as related to those parts of it, which were taken by her husband at the valuation; and that the sale under the judgment on the recognizance, did not vest in the sheriff's vendee her interest in the premises for which this ejectment was brought.

That the decrees of the several *Orphans' Courts*, the acceptance by some of the heirs of specific parcels of the property, giving security for the payment of the shares of the other heirs, and releases as to those parcels not taken by them, were equivalent to a judgment in partition, and a severance of the tenancy in common, and that consequently such parts of the intestate's estate as were thus taken were held by those who took them in severalty. That the interest of *Jane* in the parcels taken by the other children was divested; and their interest in those which she took through the medium of her husband, also divested. That each heir had a specific portion of the estate, those who did not take land, having taken money. That the interest of *Jane* originally diffused through the whole of the intestate's estate, was by the proceedings in the *Orphans' Court*, concentrated in those portions of it, which were taken by the husband in her right, in which her interest was enlarged by annexing to and engrafting upon it, her interest in those portions which were taken by the other children: That her interest, equal to one-seventh part of all her father's estate, thus falling exclusively upon the several parcels taken by her husband in right of his wife, the premises in dispute, were to bear their proportion, which, by an arithmetical calculation not necessary now to be gone through, appeared to be fifty-eight acres; for which the court gave judgment upon the verdict.

To this opinion the counsel for the plaintiff excepted.

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Elder, for the plaintiff in error, contended,—that instead of a judgment for fifty-eight acres, the court below ought to have rendered judgment for the whole of the land in controversy. By the decree of the Orphans' Court, giving the estate taken by *John Kean* in right of his wife, "to *John Kean* and *Jane* his wife, and the heirs of the said *Jane*," the fee is limited to the wife. The Orphans' Court, which proceeds as a Court of Chancery, had a right to make such a decree. It is empowered to order the estate to any daughter, she, or some one for her, paying, &c. The words of the act, "limit and appoint," have relation to the nature of the estate to be decreed and not to the time of payment. *Act of 1713, Purd. Dig.* 610. *Act of the 23d of March, 1764.* 3 *Sm. Laws*, 159. 2 *Binn.* 299. The Orphans' Court cannot take away the rights of the wife, which can only be divested by a deed acknowledged by her after a separate examination. 1 *Serg. & Rawle*, 460. 6 *Serg. & Rawle*, 267. 8 *Serg. & Rawle*, 167. The assent of the husband to these proceedings is to be inferred from his having petitioned for them in right of his wife. The decree is consistent with the rights of the parties, and if the Orphans' Court has chancery powers, there can be no doubt of its validity. 7 *Johns. Ch. R.* 113. 5 *Johns.* 464.

Fisher, for the defendants in error, when about to answer the argument of his opponent, was stopped by the court; but under an agreement of parties was permitted to assign errors in the judgment.

He contended that the recognizance bound the whole of the land taken by *John Kean* at the appraisement, as well his wife's share as the shares of the other children, to secure payment to whom the recognizance was given. Consequently, a complete title to the whole vested in the purchaser at sheriff's sale, and the plaintiff could recover nothing.

If, however, she is entitled to any thing, her title does not extend beyond one-seventh, which was her original undivided interest in every part of the estate. This interest has been regularly extinguished in those parts of the estate taken by the other children, and cannot be transferred to and kept alive in those which her husband took. He cited, 11 *Serg. & Rawle*, 327. *Walton v. Willis*, 1 *Dall.* 265. *Beatty v. Smith*, 4 *Yeates*, 103. *Taggart v. Cooper*, 1 *Serg. & Rawle*, 504. *Kean v. Franklin*, 5 *Serg. & Rawle*, 155. *Gause v. Wiley*, 4 *Serg. & Rawle*, 509. 7 *Serg. & Rawle*, 1.

The opinion of the court was delivered by

GIBSON, C. J.—The legislature had in view a partition among those who claim by descent from the intestate, unembarrassed by the intervening of a husband, which was not foreseen and therefore not provided for. When it occurred in practice, it gave rise to many difficulties and different opinions which prevailed in different parts of the

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state. In some, it was thought that as the husband might have elected to take his wife's share in money, and as he paid for the other shares with his own funds, justice required that he should be permitted to take the whole to his own use. In others, it was thought that as he had nothing in the inheritance but his marital rights over his wife's share of it, he came in only as her representative, to perform for her an act which she was incapacitated by the coverture to perform for herself, that the quantity of her interest and not her title, was altered by the decree; and consequently, that the recognizance to the other children was a lien on the whole, which might be sold as an indivisible mass; so that on all hands it was agreed that the turning of the wife's inheritance into personalty, was an evil incident to the husband's right of election, which it was impossible to prevent, and which the court would be compelled to disregard. Thus it was the practice to decree the whole to the husband, or to the wife, as the one or the other of these opinions happened to prevail. But when this court decided that the shares of the other children become the estate of the husband, as in the case of an ordinary purchase, and that the wife has an interest paramount the partition, which remains in her as her old estate, it cut the knot if it did not untie it. Whether the point decided will have the intended effect of preventing the wife's inheritance from passing to those who are not of her blood is by no means clear; but under all circumstances, perhaps nothing better could have been done. But the separating of the respective interests of the husband and wife removed all difficulty in regard to subordinate questions. As the *Orphans' Court* has not power over the rights of the parties, their estates are not to be moulded to the form of the decree; the legal estate, when confirmed to the husband or to the wife, being held by either in trust for the other, according to their respective interests. In the case before us, there is nothing in the record to show that the estate was decreed to the wife, with the assent of the husband; on the contrary it is evident that it owes its form to a misconception of the rights of the parties. Had the husband intended to vest the title to the whole in the wife, he would have executed a conveyance, without which his intention would rest on conjecture, which is of little account in fixing the rights of a party.

Then, as to the error assigned by the defendant. It is too plain for argument, that the recognizance of the husband does not bind the estate of his wife. He stands in a relation altogether different from that of a guardian, who elects to take at the valuation in behalf of his ward, and who for that reason, subjects the ward to his contract for payment of the purchase money. As concerns the share of his wife, who remains seised of her old estate, he takes nothing in her behalf or his own. Her right of election is an accident of her person and not of her estate, and he succeeds to it by the marriage as he does to all her other rights that are purely per-

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sonal, but what he takes in virtue of it, he takes to his own use, and it would therefore be contrary to the dictates of natural justice to permit him to pledge her estate for the price of what he has purchased for his own benefit. He could no more do so by a purchase of the shares of the other children and giving a recognizance in the *Orphans' Court*, than by the purchase of any other real estate, and giving security for the purchase money by mortgage or judgment.

Then if the title and estate of the wife are unaltered, the proportion to which the plaintiff is entitled here is easily determined. Claiming paramount the partition, she is entitled to what she inherited,—an undivided seventh of the lot in question. The children succeeded to the inheritance as tenants in common of the whole, the estate of each being an undivided interest in every part and particle of it. By what process then has the plaintiff's interest which originally pervaded the whole, been concentrated in a part? As regards the land in dispute, her estate is what it was at the death of her father; and as regards the other portions, it has been divested by the decree of the *Orphans' Court*, or by her conveyance, and it would be obviously unjust to have her interest in those portions that were turned into personalty by her own act or the act of the law, fastened upon this part of the inheritance in the hands of a *bona fide* purchaser. She is therefore to recover but an undivided seventh of the land in dispute.

Judgment reversed, and judgment for the plaintiff for an undivided seventh part of the lands described in the writ.

[LANCASTER, JUNE 6, 1827.]

REIGART *against* M'GRATH.

IN ERROR.

On appeal from an award of arbitrators to the Mayor's Court of the city of *Lancaster*, the deputy of the clerk of the said court is competent to administer the oath.

WRIT of error to the Mayor's Court of the city of *Lancaster*.

From the record, this appeared to be an action on the case in *assumpsit*, in which an award of arbitrators was filed on the 24th of June, 1824, finding the sum of fifteen dollars with costs in favour of the plaintiff below, who was also plaintiff in error. On the 14th of July following, the defendant entered an appeal from the award. The oath on the appeal was administered by J. C. Stambaugh for Henry Hibshman, clerk of the Mayor's Court. On motion of the

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plaintiff's counsel, the court granted a rule to show cause why the appeal should not be stricken off.

It was proved by the deposition of Mr. *Stambaugh*, that he had no written delegation from Mr. *Hibshman*, but acted under a parol authority to do all the business appertaining to the office of clerk of the Mayor's Court.

After argument, the court below were of opinion, that the clerk of the Mayor's Court had no power, under the acts of assembly, to administer an oath on an appeal, but that the oath might be administered by an alderman or justice of the peace. The court considered the administration of an oath a judicial act, and that a judicial officer could not delegate his power, unless specially authorized to do so by his commission.

The rule was therefore made absolute, and the appeal stricken off, which was the foundation of the present writ of error.

W. Hopkins, for the plaintiff in error, contended,—that the oath on the appeal was well administered. The twentieth section of the act of the 20th of *March*, 1818, incorporating the city of *Lancaster*, 7 *Laws of Penn.* 102, authorizes the governor to appoint a clerk for the Mayor's Court of the said city; and the supplemental act of the 24th of *February*, 1820, 7 *Laws of Penn.* 253, by which civil jurisdiction is conferred on the Mayor's Court in cases of appeal, places the clerk of the Mayor's Court, both as to emoluments and duties, upon the same footing as the prothonotary of the Court of Common Pleas, who by the 27th section of the act of the 20th of *March*, 1810, (*Purd. Dig.* 23,) is authorized to administer the oath required by that act on an appeal. By the second section of that act, the counsel contended, the prothonotary's clerk had the same power. By the act, too, of the 13th of *April*, 1791, (*Purd. Dig.* 401,) among other important powers given to prothonotaries, that of administering oaths is included. There are other acts giving large powers to prothonotaries, which are invariably, and often necessarily, performed by their clerks. In the case of *The Commonwealth v. Greason*, 5 *Serg. & Rawle*, 333, it was decided that a deputy clerk of the peace had power to administer the oath required by the act for registering slaves. The convenience of the practice is obvious, and where the construction of a statute is doubtful, convenience should turn the scale. 1 *Dall.* 78.

Champneys, for the defendant in error, insisted—that the power to administer oaths must always be specially given; and, admitting the authority of the clerk himself to perform that duty, it by no means followed that his deputy had the same power. A prothonotary had no power to appoint a deputy, because the power was not contained in his commission. *Jacobs' Law Dict.* 251. Those, therefore, who act for him, can act only in his name. An oath administered by his clerk, in his presence, is valid, because it is his own act; but, where he is absent, it is of no validity.

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The opinion of the court was delivered by

GIBSON, J.—It is not disputed that in respect to the power in question the legislature has put the clerk of the Mayor's Court of this city, on a footing with the prothonotaries of the Common Pleas; and these have express power to administer the oath by the terms of the arbitration act. The question, then, is whether this power may be delegated; and the case of the *Commonwealth v. Greason*, goes far to determine that it may. The argument on the other side is, that the administration of the oath being on a judicial proceeding, is a judicial act; and that the case is different in this respect from the *Commonwealth v. Greason*, inasmuch as the provisions of the registry act involve no judicial proceeding whatever, and consequently that the duty of the clerk of the Quarter Sessions was purely ministerial. The true line of distinction, I apprehend, lies between those cases where authority to administer an oath is an accessory of judicial power residing in the officer; and those where it is conferred specifically by an immediate grant. In the first, the officer cannot delegate the principal: in the second, there is neither principal nor accessory, nor any thing but a naked act directed to be done by a statute. Now what judicial power is there supposed to reside in the person of a prothonotary? The nominating of arbitrators involves the exercise of discretion, and may, therefore, be supposed to approach nearer to a judicial act than any other within the scope of his duties. Arbitrators when appointed are judges, but those who appoint them are not necessarily so. A power of appointment is of an executive not of a judicial nature, otherwise the governor, who appoints judges and all other officers, would be what he unquestionably is not, a judicial instead of an executive magistrate. It furnishes no reply that even he cannot delegate his powers. His office is a high public trust, for which he is chosen on account of personal fitness; and for that reason it can, for the most part, be executed only in person. But even the executive may delegate his powers where they are purely ministerial and do not call for the employment of any personal qualification; as for instance the power of administering judicial oaths, (the identical power in question,) which although it may be exercised by him in person, is invariably intrusted to others by virtue of a *dedimus protestatem*. But, however this may be, it is certain that inferior offices which involve no peculiar trust, may be executed by deputy; and such I take to be the office of prothonotary of the Common Pleas, or clerk of the Mayor's Court of this city. In construing statutes, regard must be had to public convenience as an object of primary consideration, and how far this will be promoted by the construction which I have indicated, may be judged by the practice that has immemorially prevailed. The duties of almost every prothonotary in the state, are performed either wholly or in part, by clerks, who act under

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a parol authority, and often in the absence of the principal; nor can it be otherwise as long as the principal shall be subject to those contingencies which happen to all men. Sickness may prevent him from executing his office in person; whilst the business of suitors may be too urgent to admit of delay, and were they to await his recovery, the right of appeal for instance might be frustrated by his inability to take the necessary bail and administer the oath within the period presented by law. Nor can an inference unfavourable to the argument be raised from the fact that the power of substitution has been conferred on registers of wills in express terms. These are to every intent judicial officers, and such a provision was therefore not only expedient but indispensable. But this, on the other hand, discloses the opinion of the legislature as to the requirements of public convenience in similar cases; for, had the legislature supposed that prothonotaries were destitute of the power in question, it is impossible to doubt that they would have been invested with it as readily as were the registers of wills. The conclusion from all this is, that the Mayor's Court erred in quashing the appeal.

Judgment reversed, and the record remitted, with directions to reinstate the appeal.

[LANCASTER, JUNE 6, 1827.]

SPANGLER *against* The COMMONWEALTH, for the use
of the Administrators of MARTIN.

IN ERROR.

Wherever a writ of *feri facias* is levied upon goods, and there is a claim of property adverse to the defendant in the execution, of such a nature as would reasonably raise a doubt or apprehension as to the title, or create a pause in the mind of a constant man, the sheriff has a right to call on the plaintiff for a reasonable indemnity.

ERROR to the Court of Common Pleas of York county.

This was a *scire facias* upon the recognizance entered into by Zachariah Spangler, the sheriff of York county, and his sureties, and the breach was assigned in these words:—

“ Yet the said Zachariah Spangler, contrary to his duty as sheriff aforesaid, did then and there neglect, omit, and refuse to execute the said *feri facias*, there being then and there and before the return of the said writ within the said county, goods and chattels of the said Joseph Snodgrass, on which the said *feri facias* might have been, and ought to have been levied, of which the said Zachariah then and there had notice, and afterwards, to wit, on the

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first Monday of *November*, in the year 1820, the said *Zachariah* did falsely return to the said court, on the said writ of *fieri facias*, that there were no goods and chattels of the said *Joseph*, on which the same, as by the said writ and return in the said court manifestly appears, could be levied within his bailiwick to the damage, &c."

In the court below a case was stated to be considered as a special verdict, which set forth, that on the 9th of *June*, 1820, *Joseph Snodgrass*, in the writ of *fieri facias* mentioned, was possessed, at his farm, in *Chanceford* township, *York* county, of the goods and chattels in an annexed schedule contained, and being so possessed, he on that day sold, and transferred the same to one *Joseph Orson*, for the purpose of securing a debt, as appeared by a bill of sale referred to, which said goods and chattels were left in the possession of the said *Joseph Snodgrass*, and remained in his possession until about the year 1822. That on the 12th of *August*, 1820, the defendant went to the house of the said *Joseph Snodgrass*, with the *fieri facias* in the writ of *scire facias* mentioned, and being about to levy the same on the said goods, the said *Joseph Snodgrass* disclaimed all title to the same, and they were claimed by the said *Joseph Orson*, by virtue of the aforesaid bill of sale; that the defendant then went to the plaintiff and asked him for a bond of indemnity, which he refused to give: that the defendant proceeded no further in the execution of the said writ, and returned *nulla bona* on the same. If upon these facts the court should be of opinion that the plaintiffs were entitled to recover, judgment to be entered for plaintiffs for a certain sum; if otherwise, judgment of nonsuit to be entered.

The court below gave judgment for the plaintiffs.

Wadsworth, for the plaintiff in error, insisted that the plaintiff was not bound to levy unless he received a bond of indemnity. In *England* the practice is for the sheriff upon an adverse claim of property to summon an inquest, whose finding justifies a return of *nulla bona*, though it does not bind the rights of strangers. 8 *Johns*. 185. 15 *Johns*. 147. 7 *Mass*. 123. 9 *Mass*. 112. The practice in *Pennsylvania* has always been different, and the course has uniformly been for the party insisting upon the execution of the writ to indemnify the sheriff. The right of demanding a bond of indemnity, may not perhaps exist in all cases, but the sheriff is entitled to a reasonable exercise of that right.

Lewis and *Dunker*, *contra*, argued that the proper course was for the sheriff to summon an inquest, and that this course might be pursued in *Pennsylvania*, as well as in *England*.

The opinion of the court was delivered by

DUNCAN, J.—In a *scire facias* on a recognizance given by the sheriff and his securities, the breach assigned was for a false return of *nulla bona*, on a *fieri facias* against one *Joseph Snodgrass*.

(Spangler v. The Commonwealth, for the use of the Administrators of Martin.)

The case stated in the nature of special verdict I refer to. This special finding opens a wide field of investigation on the duties of sheriffs.

The general question referred to the court is, whether or not the plaintiffs were entitled to recover. This special case is very incorrect and imperfect; for whether the goods were the goods of *Snodgrass*, the defendant in the execution, *is not a fact stated*, and the court cannot induce or infer it from the circumstances, and therefore the cause goes back for that defect; but the court consider it proper to state their general views on the question agitated.

In *England* it is certainly the course, where the sheriff has a doubt respecting the property of the goods, to inquire by a jury in whom the property is, or else not to meddle at all with such goods as do not plainly appear to be the proper goods of the defendant. The finding of this jury or inquest, will justify him in returning *nulla bona*, and mitigate damages in an action of trespass, if the goods seized should not happen to be the goods of the defendant. *Dalt. Sher.* 140. *Gilb. Evid.* 21. This finding by the sheriff's inquest does not settle the question of property between the litigant parties. It is not a proceeding immediately from the court, but merely an inquest of office to indemnify the sheriff in making the return to the writ, and the court will not set aside the inquest, nor order a new writ of inquiry; for this is an inquiry merely collateral to the cause, and is no part of the judicial proceedings. 2 *Tid.* 921. The sheriff, in seizing the goods, acts at his peril, and therefore it would be a harsh doctrine to leave him unprotected and exposed to loss where he acts *bona fide*: this would be a severe line of justice. On the other hand, it would not seem reasonable that he should on shallow pretences refuse to execute the writ; for this would be leaving a plaintiff open to a connivance between the defendant and the sheriff to conjure up some unfounded claim of property in a stranger; and I would have been glad to have found the inquest by the sheriff introduced among us, but this never has been done in this state, and would seem, from the decision in *Weaver v. Lawrence*, (1 *Dall.* 156,) not to be warranted. It has been usual for the sheriff to require reasonable security in case of reasonable doubt, and this has been so generally acquiesced in, that no controversy has before this arisen on it. But a case might arise where the sheriff, on very frivolous grounds, might refuse to act without unreasonable security to indemnify him. The plaintiff might be poor, and not able to satisfy the sheriff as to the security offered. He might be distant, and the sheriff, on the most groundless claim, refuse to act; and, where the goods are found in the hands of a defendant claimed by another under a bill of sale or mortgage, and suffered to continue in the possession of the supposed vendor, who trusts the goods to him on his personal credit, to use as his own; thus enabling him to induce unwary men to

(Spangler v. The Commonwealth, for the use of the Administrators of Martin.) trust him, that this claim should stop the hand of the sheriff, would seem to be an alarming proposition. It would afford a complete protection to the dishonest debtor. A plan might be formed, and would be formed, between him and some friend, that he should enjoy the goods for his own use, and the claimant would not molest him, unless the goods were seized by some person. What is, however, to protect a sheriff, if in all cases he were obliged to act, and to act, too, without any indemnification? If we have not used the inquisition to protect the sheriff, it does not follow that he is without protection. It is, I know, difficult to draw any precise line; but I think, consistently with justice, and in conformity to our practice, a line of justice might be drawn, which, while it protects sheriffs from unnecessary risks, secures plaintiffs from connivance between the sheriff and the defendant in the execution,—and that is, that wherever there is a claim of property adverse to that of the defendant, of that kind which would reasonably raise a doubt or apprehension as to the title, or create a pause in the mind of a constant man, the sheriff has a right to call on the plaintiff for a reasonable indemnity. This must depend on the circumstances of each particular case. In an action for a false return, it ought to be a justification as much as the inquisition, if one could be made by the sheriff. This would be a fairer mode than suffering a sheriff to hold his own inquisition for his own justification. This power, in his hands, would be liable to great abuse; and even where the sheriff could hold an inquisition, if the plaintiff in the execution offer in writing to indemnify the sheriff, it would seem he is bound to proceed and sell, and cannot excuse himself by taking an inquest. 15 Johns. 147. 8 Johns. 185. The inquest is not conclusive on the question of property, though under certain qualifications, in some cases it will excuse the sheriff, and protect him from a suit on a false return. In *The Insurance Co. of Pennsylvania v. Ketland*, (1 Binn. 499,) the court refused, on the motion of a defendant, to stay proceedings on an execution levied on goods in the defendant's possession, and direct an issue to try the property, on an allegation that the goods belonged to third persons. That was an application by the defendant, and not by the sheriff, who took the risk on the security he had taken from the plaintiff; but I do not entertain a doubt of the power of the court, where the sheriff has levied, to enlarge the time for the sheriff's making a return to a *fieri facias* until he is indemnified, on the suggestion of a reasonable doubt, for the purpose of inducing persons setting up claims to the property to contest them in a trial at law. The judgment, in this case, cannot stand. The record is remanded to the Court of Common Pleas for the defect in the finding, and a *venire facias de novo* directed. The court think it proper to suggest, that a general verdict in this case would be best adapted to the attainment of justice, when either party could except to the

(*Spangler v. The Commonwealth*, for the use of the Administrators of *Martin*.) opinion of the court, on any question of law in which they might suppose they had misdirected the jury; for this court, on a special verdict, can neither make any inference, or draw any conclusion from circumstances when the fact itself is not found.

[LANCASTER, JUNE 6, 1827.]

ELLMAKER *against* BUCKLEY.

IN ERROR.

The opinion of the judge of the District Court of *Lancaster* county, as to transferring, or refusing to transfer, a cause to the Court of Common Pleas, under the second section of the act of the 18th of *January*, 1821, is conclusive; and its propriety cannot be inquired into in this court.

A party cannot, before he has opened his case, introduce it to the jury, by cross-examining the witnesses of the adverse party.

In what manner, and to what extent, a witness may be cross-examined.

Arbitrators are not only incompetent to give evidence of their own misconduct, but also to give evidence of that of a party, if such evidence at the same time involves the misconduct of the arbitrators.

If an act be done by a party, before the submission of a cause to arbitrators, and not with a view to deceive them, which, however, may have an effect upon their opinions, it does not vitiate the award.

In an action on an award, the defendant cannot give evidence which was not produced before the arbitrators, to show that the plaintiff had no merits.

WRIT of error to the District Court of *Lancaster* county, in an action of debt on an award of arbitrators, brought by *Daniel Buckley*, the defendant in error, against *Leonard Ellmaker*, the plaintiff in error.

Whilst pending in the court below, a motion was made by the defendant's counsel, to transfer this cause, together with two others between the same parties, and brought to the same term, to the Court of Common Pleas of *Lancaster* county, on the ground, that the judge of the District Court had been the attorney of the plaintiff in two earlier suits, from which one of the three suits, the transfer of which was asked for, originated, and that the cause of action of both the earlier suits, was the source from which the three subsequent suits arose. The first of the two earlier suits was brought to *February* Term, 1803, and was discontinued on the 6th of *April*, 1814. The last was brought to *November* Term, 1814, and the plaintiff was nonsuited on the 26th of *November*, 1821. Both these suits were for an alleged nuisance in raising the defendant's mill dam, so as to make the water flow back upon the plaintiff's land. The award upon which the present suit was brought, was founded upon a submission proposed by *Buckley*, on

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the 17th, and finally entered into on the 23d of *November*, 1820, by which the controversy respecting the dam was submitted to three referees, who, on the 29th of *December*, 1820, made an award in favour of *Buckley*, the plaintiff.

The judge of the District Court being of opinion that the suit in which he had been concerned, being for an alleged nuisance, and those which he was asked to transfer being an alleged submission and award, in the trial of which he could have nothing to do with any question of nuisance, though very unwilling to try the causes, he considered it his duty to refuse an order to transfer them. This opinion of the judge was excepted to by the defendant's counsel.

The plaintiff, having on the trial in the court below, proceeded with his proof to establish the existence and loss of the award, and evidence to supply that loss by the examination of the referees, the defendant's counsel offered to cross-examine the witnesses on the subject-matter of this suit, and in avoidance of the award, before he had opened his defence. This being opposed by the plaintiff's counsel, the court was of opinion that the defendant was not entitled to cross-examine the plaintiff's witnesses before he had opened his defence, to which the counsel of the defendant excepted.

The defendant offered to prove, by the cross-examination of one of the referees, that on the second day of their view, and after they had broken up and dispersed, one or more of them accompanied the plaintiff home, walking along the creek, dam and races between the houses of the plaintiff and defendant; and that while on their way, and after having arrived at the house of the plaintiff, he and the arbitrators conversed together on the subject of the controversy, and he pointed out to them, when neither the defendant nor any one on his behalf was present, the injuries which he alleged he had sustained from the defendant's dam. The testimony being objected to by the plaintiff, was rejected by the court, to whose opinion an exception was again taken.

An offer was then made by the defendants to prove, that immediately before the meeting of the struck jury and viewers, in the suit brought by *Buckley* against *Ellmaker*, to *December Term*, 1814, *Buckley*, the plaintiff, with the view to deceive the said viewers, dug a new tail race from his forge, and dug it on a level or very nearly so, and lower than the creek, and dug it deeper at the upper end next the forge than at any other part; and that, after the submission to arbitrators, the race was kept by him in the same state until after the view by the arbitrators, with the intent and view of deceiving the said arbitrators. To this evidence, also, the plaintiff objected, and the judge having sustained the objection, a bill of exceptions to his opinion was tendered.

The defendant then offered to prove "by the referees on their cross examination, that at the meetings of the referees to examine the water and regulate it, the plaintiff held intercourse with and

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made communications to the referees, behind the back and without the knowledge of the defendant, on the subject matters of the award; that the referees adopted a mode of proceeding and a standard for fixing the height the water should swell and to which defendant's dam should be reduced, which put the whole of their proceedings entirely in the power of and under the influence and control of the plaintiff; that the experiment consisted in a proposition that *Buckley's* forge dam which lay above, was to be shut so as to cause the current of the creek to flow over the breast of his dam—that one of the referees was to be stationed at *Ellmaker's* dam—and that the other two of the referees were to take their station at the line between *Buckley* and *Ellmaker*, when the dam of *Ellmaker* was to be shut—that a post was to be placed at the line by the two referees who were to notify the one at dam when the water rose half an inch on the post, and that in that way they fixed the standard of regulation, leaving the water in *Buckley's* dam to be used at his pleasure and without any control over him—*by which the current of the creek was put completely in his power, to control the influence of the water on the standard adopted by the referees by increasing it at his will*—that the referees adopted no mode to ascertain what the current of the creek was. And by putting this experiment into effect the whole of it was a fallacy ruinous to the defendant, and advantageous to the plaintiff, by leaving the control of the whole of *Buckley's* dam in his power."

The evidence thus offered was "rejected so far as regards the referees, but admitted, provided it could be proved by other testimony; except so much as was matter of argument and inference, and not matter of fact."

His Honour certified that the above was the original offer of the evidence, and the ground of rejecting it, so far as it was rejected, so noted at the time of the trial, in his own handwriting; that the bill of exceptions afterwards tendered, did not exhibit the circumstances correctly, as to the partial rejection of the evidence; and therefore he signed the original paper in lieu of the bill.

The defendant further offered to prove "that he had a complete right to the water now in dispute, before and at the time of the proposition made by the plaintiff, for this reference—that this mill-dam was erected in 1776, when *John Clemson* was owner of the lands now claimed by the plaintiff, and that the dam was then a little higher than it is now, owing to its settling since—that said dam swelled the water back on the lands of the said *John Clemson* rather higher than it was ever swelled on *Daniel Buckley*—that the said *John Clemson* knew of and agreed to the erection of the said dam by the defendant, and its swelling in the bed of the creek on his land, and was agreed to and acquiesced in the same, and allowed thereof, and furnished his mulatto man and horse and cart to assist in the erection of the said dam—that the said dam

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was in full use and operation from its erection till the death of the said *John Clemson*, in 1794, with his consent and approbation; he living during the whole time within three quarters of a mile of the said dam—That after the lands of the said *Clemson* came to be *Buckley's*, on said *Clemson's* death, he acquiesced in the swelling of the defendant's dam in the said creek as it had done in *Clemson's* lifetime, until the beginning of the year 1803, when the said *Buckley* brought an action on the case against *Ellmaker*, which he discontinued on the 6th of *April*, 1814, (prout the record;) that he brought another action on the case to *November Term*, 1814, of the Court of Common Pleas, of *Lancaster* county, which he continued, and put to issue, and took a rule for a view in the same; *that at the time the viewers were viewing, or after or about the time of the viewers completing the view, he the said Daniel Buckley at the time of the view, and shortly before he made propositions of accommodation according to the testimony of John Passmore, used the following threats to the defendant, a man then of eighty years: viz. 'If Leonard Ellmaker will not give up to me in the matter now in dispute between us, I will keep it in law as long as I live, and will put in my will that my sons shall keep it in law as long as they live,'—that at the same time he applied many opprobrious epithets to Jacob Swartzwalter; called him a methodist, and said as follows, viz. if a religious man wears a plain coat, I have not the least doubt but he is a villain—that the alleged submission was coerced and obtained by the said threats—that the referees in this cause, with a full knowledge of all the matters aforesaid, made a plain and palpable mistake in the matters of law and fact—rejected—except as to the records of the suits and as to declaration made to the defendant, or any person acting for him at the time.'*

To this paper the judge appended the following statement:—

“This is the original offer of the matter of Bill No. 4: as marked by me at the trial, with the written rejection thereof as annexed thereto, showing the grounds and reason of rejecting the same, the court did not reject any evidence offered as to direct plain or palpable mistake of either law or fact, nor was any such evidence offered other than as a deduction or inference from the account of the disputes prior to the time of entering into the arbitration, and which the arbitration was intended to settle; and the offer called on the court to re-examine the whole subject of the original dispute which was refused: I have, therefore, signed the original offer in lieu of the bill afterwards tendered, as giving a more correct view of what actually occurred.”

The lines in Italics in these two papers, were omitted in the bills of exception presented to the judge for signature.

The written rejection above referred to by His Honour, was in these words:—

“You shall not examine into or unravel the merits of the award

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made by judges of the parties' own choosing, nor what mode of examination they adopted, merely for the purpose of hunting for some supposed mistake: you shall not examine into the whole evidence before the arbitrators for the purpose of re-examining the case, or the correctness of the judgment of the arbitrators; for though it may have been unreasonable or unsatisfactory to the parties, it cannot be avoided for that reason: you may show there was a mistake, that a fact was misrepresented which influenced the arbitrators—and you may examine to that, and you may show that evidence was rejected, which ought to have been received; and in that case, from necessity, you must inquire into its materiality, and so far inquire into the nature of the controversy as may be sufficient to show this materiality, but you shall not re-examine their judgment and try the case over again: it is not in nature of a new trial or appeal, the award is conclusive, unless it can be impeached for fraud, mistake, &c.; but you shall not fish out a mistake by re-examining the whole case to ascertain whether the court might not have drawn a different conclusion: this would put an end to all awards: a court of equity will not go into the merits, nor re-judge the judgment of arbitrators: if a mistake is shown I presume the arbitrator may be asked if he acted under such false representation of the fact, or mistook one thing for the other: you cannot correct the error of arbitrators in their judgment on existing facts, but may show that the fact was concealed or made to appear different from what it really was."

After one of the referees had stated in his testimony the experiment made by them as to the swelling of the water, the defendant proposed to ask him the following questions:—"In making the experiment to ascertain at what height of *Ellmaker's* dam the water would be swelled back to the line between *Ellmaker* and *Buckley*, what assurance or evidence had you, that no more than the usual quantity of water was passing down the creek from *Buckley's* forge?" The plaintiff's counsel objected to the question being put, and the judge having sustained the objection, his opinion was again excepted to by the counsel for the defendant.

In this court, error was assigned in the several opinions of the judge below appearing on the record. These errors having been argued by *Ellmaker* and *Hopkins*, for the plaintiff in error, and by *Jenkins* and *T. Sergeant*, for the defendant in error—

The opinion of the court was delivered by

GIBSON, C. J.—Although we may not concur in the opinions of the judge of the District Court, in regard to the identity of the cause of action in the various suits between the parties, we are of opinion the legislature intended to refer the inquiry in this respect to his own discretion. The words of the act, undoubtedly lead to such a conclusion; and a reasonable presumption arises, from the nature of the case, that it was supposed none would be so

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able as he to determine whether he stood in a relation to the parties which would disqualify him as a judge. His order in a cause actually transferred, would indisputably be conclusive, because he might privately have been of counsel or directly interested in a way known only to himself, and the presumption, therefore, would be that he had acted on a knowledge of facts perfectly proper to influence his determination, but which the party to be affected might be unable to prove; and if his determination were conclusive in the one way, it would be unreasonable if it were not so in the other.

The next bill of exceptions brings into question the right of a party to introduce his case by cross examining the adverse party's witnesses, and before he has opened it to the jury. It is laid down that in cross examinations, great latitude is allowed in putting questions; but that relates to the manner and not to the matter. A witness may not be cross examined to facts which are wholly foreign to the points in issue, (and I would add to what he has already testified) for the purpose of contradicting him by other evidence. And here I take occasion in broad terms to dissent from the doctrine broached in Mr. *Phillips's* Law of Evidence, (211,) that a witness actually sworn though not examined by the party who has called him is subject to cross examination by the adverse party: and that the right to cross examine is continued through all the subsequent stages of the cause, so that the adverse party may call the same witness to prove his case, and for that purpose ask him leading questions. In respect to the first of these two propositions, Mr. *Phillips* himself explicitly and truly states, that the use of the cross examination is to sift the evidence and try the credibility of the witness, but in this view it would be palpably absurd when applied to a person who had given no evidence at all. And in regard to the second, the law will not inflexibly infer that a witness is a willing one merely because he is produced by the party who thinks his evidence material. Such an inference would be neither practically nor theoretically true. It is not to be presumed that a party is in a condition to prove his case by the testimony of his friends; on the contrary, he is under the necessity of resorting to those who may happen to know something of the transaction, and these are for the most part just as likely to be his enemies. And the bias supposed to be created by being called to testify on one side, is too slight to serve as the foundation of a rule unlimited in its extent. Certainly no bias is to be presumed after the witness has been called by both parties, as he undoubtedly is when produced a second time, not for the legitimate purposes of a cross examination, but to testify to new matter on the adverse part; at least, it would be unreasonable to raise such a presumption against a party who is the first to use the testimony of the witness only because he is compelled to do so by a necessity arising out of the order of proof. In ordinary cases the witness may be cross ex-

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amined by the party adverse to him, whose witness he is at the time, and even then only to discredit him or to bring out something supposed to be withheld; but under special circumstances, such as an apparent unwillingness to testify frankly and fully, the court may at its discretion, suffer the inquiry to take the shape of a cross examination without distinction as to the party by whom the witness is called; and for myself, I would not without further consideration, pronounce the exercise of the discretion depending as it does on circumstances which cannot be fully made to appear in a court of error, to be a legitimate subject of a bill of exceptions. If then a party may not prove his case by evidence extracted on a cross examination after he has proposed his case to the jury, *a fortiori*, he may not do so before.

The other bills of exceptions relate, first, to evidence of misconduct by the testimony of the arbitrators themselves; secondly, to evidence of acts done before the submission, which are said to have tended to mislead the arbitrators; thirdly, to evidence of the defendant's title, to show that the award was inconsistent with the merits.

As to the first, it was conceded during the argument, that arbitrators are incompetent to prove misconduct in themselves. But the evidence is said to have been proposed with a view to disclose misconduct only on the part of the plaintiff. But the species of misconduct charged is social, and involves the conduct of the arbitrators as well as of the party, so that the former could not establish it without implicating themselves. The charge is, that the arbitrators, or some of them, in the absence of the defendant, accompanied the plaintiff to his home and conversed with him on the subject of the nuisance, permitting him to point out from a view of the dam and races, the injuries which he was supposed to have suffered. This, if true, was collusion, but the arbitrators being equally in fault with the parties, were incompetent to establish it.

Under the next head, it is contended the defendant should have been permitted to show that the plaintiff had sunk his tail race deeper at the forge than in any other part, to give to the forge wheels the appearance of being incumbered with back-water; and that the race was permitted to remain in that state till after the supposed injury was viewed by the arbitrators. But whatever may have been the effect of this, it is sufficient that the state of the race complained of, was produced before the alleged nuisance was submitted to the arbitrators, and it could, therefore, not have been done with a view to deceive. But all danger might have been avoided by the party whose business it was to put the arbitrators on their guard, and besides there is no allegation that they were actually deceived.

Finally, the defendant offered to exhibit his title to show that the plaintiff could not have had merits. An award may undoubtedly be avoided for a plain mistake in matter of fact or of law in

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judging of the case as it appeared on the evidence laid before the arbitrators. Here, however, the plaintiff did not propose to show the case as it stood on the evidence and to point out a mistake in any part of it, but to make out his case afresh, without regard to the evidence which he had before given; and thus to try¹ over again the matters submitted on the original merits. Were he suffered in this manner to throw open the award, he might perhaps succeed notwithstanding the arbitrators had decided justly and properly on the fact established by the evidence; which would be² palpably unreasonable and render awards of but little value. The law is, however, that the mistake, to be available, must be shown to be in the judgment of the arbitrators on the premises; and as nothing of that sort was alleged, it is clear that the evidence was properly rejected.

Judgment affirmed.

[LANCASTER, MAY 29, 1827.]

RUDY *against* WOLF and another, Administrators of DAY.

IN ERROR.

If the obligee, upon assigning a bond, enter into a covenant with the assignee "to stand security for the payment of it," this is an engagement to pay the money on the insolvency of the obligor, provided the assignee use due diligence to obtain payment from the obligor.

What is due diligence is a fact for the determination of the jury, upon the whole evidence submitted to them.

ON a writ of error to the District Court of *York* county, it appeared the defendants in error, *Adam Wolf* and *Magdalena Day*, administrators of *Frederick Day*, deceased, brought this action of covenant against *George Rudy*, the defendant in error, on an assignment of a bond given by *Jacob Lichtenberger* to the said *George Rudy*, dated the 21st of *November*, 1814, conditioned for the payment of three hundred and fifty dollars.

The assignment, which bore date the 20th of *May*, 1816, was in these words:—

"Know all men by these presents, that for a valuable consideration to me in hand, I do hereby assign all my right, title, interest, and claim of the within bond to *Frederick Day*, which bond I stand security to the said *Day*, for the payment of, as witness my hand and seal, &c."

The declaration contained an averment that the said *George* did covenant and agree with the said *Frederick*, that in case the said *Jacob* should neglect and fail to pay the said sum of money due on the said bond, that he the said *George* would pay the same. It

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also contained an averment of the non-payment of the money by *Lichtenberger* and of his insolvency.

It appeared from the evidence given on the trial, that in the year 1817, *Rudy* told *Day*, that he would be security no longer, and that he must push *Lichtenberger* for the money; and the several years after, *Day* had declared that *Rudy* had given him notice to push *Lichtenberger*, or he would no longer be bail, to which he, *Day*, replied, "If you wish to have *Lichtenberger* pushed, come to my house—pay me the money, and I will give you the bond, and you may push him yourself. I will not push him."

On the 7th of *April*, 1824, *Day* obtained judgment upon the bond against *Lichtenberger*, who on the 16th of *August*, 1825, was discharged under the insolvent laws: at what term he became insolvent did not appear. He had, prior to his discharge, both real and personal property, but was considerably indebted. When he applied for the benefit of the insolvent laws, he returned no property.

The court below having charged the jury that the plaintiffs were entitled to recover the principal and interest due upon the bond, a verdict was returned accordingly; and the defendant took a writ of error.

Gardner and Wadsworth, for the plaintiff in error, contended that the assignee of the bond, was bound by the nature of the covenant upon which the suit was brought, to use all the means in his power to recover the money from the principal debtor; and unless he showed that he had done so, he had no right to resort to the defendant, who was merely a surety. They cited 4 *Dall.* 133. 10 *Johns.* 587. 7 *Johns.* 332, 339. 1 *Madd. Ch.* 233. 5 *Johns.* 176. 13 *Serg. & Rawle*, 157. *Chitty on Bills*, 130, 316, 317. 15 *Johns.* 68.

Barnitz and Durkey, contra, said that this was not a case in equity, but at law. That the covenant was a positive engagement by the assignor to pay the money, and therefore the assignee was not bound to sue the obligor. It was quite enough that he offered to permit the assignor to sue.

The opinion of the court was delivered by

ROGERS, J.—The 21st of *November*, 1814, *Jacob Lichtenberger* gave a bond for three hundred and fifty dollars to *George Rudy*, which *George Rudy* assigned for a valuable consideration to *Frederick Day*.

This is an action of covenant brought by the administrators of *Frederick Day*, on this assignment. The assignment is in the words following:—

May 20th 1814.—"Know all men by these presents, that for a valuable consideration to me in hand paid, I do hereby assign all my right, title, interest, and claim of the within bond, to *Frederick Day*, which bond, I stand security to the said *Day* for the payment of, as witness my hand and seal," &c.

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The breach assigned in the declaration is, that the said *George* did covenant and agree with the said *Frederick*, that in case the said *Jacob* should neglect and fail to pay the said sum of money due on the said bond, that he the said *George* would pay the same. The declaration, also, contains an averment of the non-payment of the money, and of the insolvency of *Jacob Lichtenberger*.

The question to be determined is, what is the character of the writing declared on? Is it an absolute engagement on the part of *Rudy*, that if *Lichtenberger* neglect or fail to pay the money in a reasonable time, that he will pay it for him, or is it a conditional engagement to pay the money on the insolvency of *Lichtenberger*? It may be remarked that the latter seems to be the construction of the plaintiffs, otherwise the averment of the insolvency of *Lichtenberger* in the declaration was wholly unnecessary.

After consideration, I have no doubt of the legal construction of the assignment. It is an engagement to pay the money, on the insolvency of *Lichtenberger*, provided *Day* uses ordinary diligence for its collection. If *Day* has been guilty of gross negligence, or has not used due diligence, and in consequence the money has been lost, it would clearly be a discharge of *Rudy*. The assignment amounts to a guarantee, that if *Lichtenberger* became insolvent, and *Day* used due and ordinary diligence, then he would pay the amount of the money with its interest.

It does not, in my apprehension, come within the scope of the cases of principal and surety, nor can I perceive a shadow of reason for considering *Rudy* as a principal debtor, and liable in the first instance to *Day*. *Rudy* sold *Day* the bond, and warranted the recovery of the money if due diligence was used. And this position is rather sustained than weakened by the case of *Hunt's Administrators v. Adams*, cited by the defendants in error. The Chief Justice says, "if the note had been made by *Chaplin*, and delivered to *Bennet*, the intestate, and afterwards the defendant had been induced to guaranty the payment, it would have been necessary to consider the defendant's objection." 5 *Mass. R.* 361, 362.

It appears from the evidence, that *Lichtenberger* is now insolvent, but when he became so, does not appear; that *Day* refused to push him, although repeatedly requested to do so, and at the same time stated, "If you wish *Lichtenberger* pushed, come to my house, pay me the money, and I will give you the bond, and you may push him yourself."

This was founded on the idea, attempted to be sustained here, that *Rudy* was absolutely bound to *Day*, which it appears to me most apparent that he was not. It was the duty of *Day* to push *Rudy* in a reasonable time, and with reasonable diligence. If any loss accrued by neglect, it should be borne by *Day* and not by

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Rudy. He had no right to require *Rudy* to pay him in the first instance.

It is unnecessary for the court to examine the evidence particularly. It is sufficient if it be laid down, that *due diligence* to recover the money from the obligor, must be used; and what is *due diligence*, must always be a part of the determination of a jury upon the whole evidence submitted to them.

This was the rule adopted in *Virginia*, on the covenant implied from the word assigned, which I consider as in point on the express covenant here. *Mackie's Executors v. Davis*, 2 Wash. R. 226, since recognized and adopted by Judge ROAN, in the case of *Berksdale v. Fenwick*, 2 Hen. & Munf. 113, Note.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, JUNE 6, 1827.]

REYNOLDS and others *against* REYNOLDS and others.

IN ERROR.

Where one witness swears directly to the execution or publication of a paper as a last will, proof by other witnesses of declarations by the testator that he had made a will, must, in order to establish the will, be in reference to that particular paper.

WRIT of error to the District Court of *Lancaster* county, in which the case was a feigned issue of *devisavit vel non*, formed to try the validity of a certain paper set up as the last will and testament of *Jacob Reynolds*.

Much evidence was given on the trial in the court below, as to the state of mind of the alleged testator, and touching other matters now not material. The main question then, and the only one in this court was, whether the alleged will had been duly proved under the act of 1705, by two witnesses, or by one witness, and such circumstances as supplied the want of a second witness.

Emanuel Reynolds, after having been offered, testified, that about the 24th or 25th of *December*, 1821, *Jacob Reynolds*, who was his brother, came to him and requested him to write a few lines in the shape of a will. The witness told him, that if he would state it, he would do it in a few days the best way he could; he was a very poor hand. In about a week or so, he wrote it and took it to *Jacob's* house, which was about a mile from his own. *Jacob* read the paper twice over while the witness staid. He looked very sober, and said it was the very thing he had wanted for some

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time. He added, that he had applied to some persons to do it and could not get it done. The witness heard nothing more on the subject until the ensuing *April*, when, on the fourth day of the week, word was brought to him that his brother *Jacob* was very ill, and desired much to see him. The message was repeated on the following day, but he was too unwell to go. On the sixth day he was sent for again, but unable to go. On the seventh day of the week he went. When he arrived there was no company in the house. He could not see his brother as he was sick and lying down. The company mostly left the house except those attending on his brother. He went in to see him. *Jacob* seemed very glad to see him, and told *Eli* (the witness's son) to go to a chest and bring a paper. *Eli* had the key. He brought the paper and *Jacob* took it in his hand and opened it. He seemed better. He put his hand down, and said, "Brother *Emanuel*, I call thee as a witness, that this is my will." *Emanuel* told him he could not conveniently be a witness; there were others, and he mentioned the names of two persons, and requested *Eli* to go for them. They were *Absalom Murray* and a person named *Hatton*, whose first name he did not recollect. Some time before the last of them came, *Jacob* took very ill. He had a kind of hiccough, and became immediately very delirious, and could do nothing afterwards. He died on seventh day night. The witness staid a couple of hours; *Jacob* was very bad and continued so until he died. On the paper in question being shown to him, the witness declared it was the same which he wrote in *December*, and which *Jacob* read twice over, and said was exactly right. He had no knowledge of any other. It was the same he said, for which *Jacob* sent to the chest in *April*, which he put his finger on, which he desired the affirmant to witness, and which he declared to be his will. Various other facts relative to the situation of the deceased, both before and after the paper was presented to him, the number and situation of his family, the conduct of the witness, and that of some of the members of his family, and many other matters were stated by the witness very much at large, as well on his cross examination as on his examination in chief, which, though important as respected the case before the jury, have no bearing upon the question before the court.

The next witness called was *Samuel Lee*, who stated, that in the latter part of *February*, 1821, as he was riding up the road between breakfast and dinner time, he saw *Jacob Reynolds* at his cow yard bars and stopped. He asked him how he was, to which *Jacob* observed that he was very poorly, weak in his limbs, &c. The witness told him he was getting to be an old man, and was on the decline, and said in a joke, he had better make a will and leave him his land, as he, (*Jacob*), had no children. *Jacob* replied, that he had heirs enough for his land without doing that. The witness said he had brothers enough to be sure to leave it to. *Jacob* replied

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that his brothers should be no heirs to his land; he had bought it himself and paid for it, and would do as he pleased. He said he had made a will, and willed it all to *Emanuel Reynolds'* son *Eli*; he allowed *Eli's* sister to have half of his personal estate; he allowed *Eli* to enjoy it as his own property. *Jacob* said he did not wish his brothers to be heirs to his estate. He was perfectly sound in his mind at the time. The witness did not know whether *Hannah*, (a daughter of *Emanuel Reynolds*, and a principal legatee) lived there. He saw her looking out of the door.

Mary Sergeant swore, that she went over to see *Jacob* about three weeks before he died, and staid two days and two nights. On the second day after breakfast, she went into his room, and in the course of conversation said, "*Jacob* thee has no children, and thy relations are all rich. When thee makes thy will remember me, and leave me something." He said he had made his will and would not alter it for any one; he had left it to *Eli* and *Hannah*; he thought they had the best right to it. He said he had got his brother *Emanuel* to write his will. He did not say what part *Eli* had got and what part *Hannah* had got. Her testimony contained nothing further that was material, except that during this interview the deceased was perfectly rational.

Several witnesses were examined on the opposite side, whose testimony tended in some respects to contradict the evidence given in support of the alleged will. It related, also, to the conduct of *Emanuel* and his family, and other circumstances which it is unnecessary now to notice.

It was the opinion of the court below, that the paper set up as the will of *Jacob Reynolds*, was not proved by two witnesses agreeably to the act of 1705, and the decisions upon it by our courts of the last resort.

The case was argued, in this court, for the plaintiffs in error, by *W. Hopkins* and *Hopkins*, who cited, *Swinb.* 82, 85, 354. *Hawk v. Hawk*, 6 *Serg. & Rawle*, 47. *Eyster v. Young*, 3 *Yeates*, 511. *Berks* and *Dauphin Turnpike Company v. Meyers*, 6 *Serg. & Rawle*, 12.

Montgomery and *Morris*, contra, referred to *Lewis v. Morris*, 1 *Dall.* 286. 1 *Day, R.* 41, (Note.) *Rossitter v. Simmons*, 6 *Serg. & Rawle*, 452, 489. 2 *Madd. Ch.* 441, 442, 443, 444. 1 *Johns. Ch. R.* 459. 2 *Johns. Ch. R.* 92. 4 *Bl. Com.* 80.

The opinion of the court was delivered by

GIBSON, C. J.—Whether the evidence of *Emanuel Reynolds* might have been left to the jury, had the act of assembly permitted the proof of execution to stand on the testimony of but one witness, is the only question that was proper for the decision of the court. Circumstances tending to lessen his credit were exclusively for the jury; it being sufficient, if they might have found the is-

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sue on his testimony as an integral part of the proof required by the act of assembly. The word "credible" in the *English* statute of frauds, has, after a long contest, been determined to mean "competent;" and here the evidence of a witness, which, if believed, goes the length of full proof, is surely competent under our statute. Now the witness deposed to acts, which, if actually done, were in all reason a publication of the paper as the last will and testament of the party. Nor do I think it material that these acts had relation to an adoption of the paper only at the time of the transaction. Publication before all the witnesses at the same time, or at all, is not necessary to the validity of a will, which may be kept secret by the testator during his life and proved by witnesses who may not have seen it before they are called to depose. Nor do I think the form of acknowledgment deposed to by the witness, is inconsistent with the alleged fact of a prior adoption of the paper as the last will and testament of the party. It is just such an acknowledgment as one might expect to be made before each of several witnesses called at different times. But I concur that there is nothing in the evidence of the other witnesses to show that the declarations of the deceased were made in reference to this particular paper, of which there is no account given by any one but *Emanuel Reynolds*. The proof of authentication, therefore, rested on the evidence of but one witness, and for that reason I concur that the judgment be affirmed.

DUNCAN, J.—I agree that the judgment be affirmed; but I think *Emanuel Reynolds* was a legal competent witness, and his evidence was proper and legal evidence by one witness, his credit to be judged by the jury; but I do not think that the want of another witness was supplied by the facts and circumstances stated by *Mary Sergeant* and *Samuel Lea*. These facts and circumstances do not go to prove the identical paper proved by *Emanuel Reynolds*. If they had tended to prove that paper; if there were circumstances from which the jury might have inferred that, the fact of execution proved by two witnesses should have been left to the jury. But there was only one witness to prove the will, and it was for the court to instruct the jury that the will was proved not by two witnesses. The legality of the execution was a question of law.

ROGERS, J.—The act of 1705, entitled, "An act concerning the probate of written and nuncupative wills, and for confirming claims of land," makes two things indispensable: 1st, That the will be in writing; and, 2dly, that it be proved by two credible witnesses.

When the will is in the handwriting of the testator, signed and sealed by him, there is generally, but little difficulty as respects the execution. I do not speak of those informal instruments which are usually intended as mere memoranda of a will afterwards to be put into form.

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Before entering into a particular examination of this case, it may be useful to bring into view some of the decisions which have been made on the act of 1705.

As early as the year 1793, it was decided, that in all cases of dispute upon the fact of execution or the sanity of the testator, the Register's Court may send an issue into the Court of Common Pleas, to have the facts tried by a jury, even without the request of either party; but when the dispute is about the *legality* of the execution, the court is the proper tribunal. 1 *Smith*, 40.

That the legal execution of the will is a question of law, is also decided in the case of *Lewis v. Lewis*, 6 *Serg. & Rawle*, 489.

The authentication of a will, by the requisite number of witnesses, is matter of law, for the determination of the court; the sanity of the testator, and all questions of fraud, belong to the jury. And when these questions were confounded by the court, it was held to be error.

It has also been held in the case of *Eyster v. Young*, that when there is a *complete witness*, one *superior* to all exceptions, that circumstances may supply the want of one witness, when they go directly to the immediate act of disposition. 3 *Yeates*, 511.

Considering this as a matter of law, was the execution of this paper, purporting to be the will of *Jacob Reynolds*, proved by two credible witnesses?

The witnesses in proof of the execution of the will, are, *Emanuel Reynolds*, who is said to be one witness, and *Mary Sergeant*, and *Samuel Lea*, who together, constitute another witness.

First, then, is *Emanuel Reynolds* a *complete witness*, superior to all exceptions, so as to permit the proof of circumstances to supply the place of one witness?

Emanuel Reynolds is the father of the two only devisees, in the instrument of writing sought to be established as the will of *Jacob Reynolds*. He comes forward under circumstances of great suspicion, which an examination of his testimony must clearly show. Can such a man be considered as a complete witness, superior to all exceptions, within the meaning of the court, in the case of *Eyster v. Young*? Permitting circumstances to supply the place of one witness, is a relaxation of the salutary rule prescribed by the act, which I, for one, may be allowed to regret, but taken with the qualifications that one witness must be a complete witness, superior to all exceptions, there is the less danger in it. This, however, would be for the jury, under the direction of the court.

Loose constructions of the statute of wills afford facilities to designing persons, to practise on the weakness of men, on the bed of sickness, or of forging instruments and supporting them by perjury, when the lips of the parties are closed for ever. And it was this, that induced the legislature in *England*, to interpose additional grounds for the protection of these last and most interesting

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dispositions of property by the passage of the statute of 29 Car. 2. c. 3. *Roberts on Wills*, 18.

In granting the right to dispose of property after death, the legislature, at the same time, guarded it against abuse, by making two credible witnesses absolutely necessary. And there is the less reason to relax the rule from the circumstance of the equal and just distribution of the estate of deceased persons, under the intestate laws of *Pennsylvania*.

This paper is not in the handwriting of *Jacob Reynolds*, the deceased, nor is it authenticated by his signature, nor is there proof by two persons, who were present when he gave the instructions for the drawing of his will.

Emanuel Reynolds testifies, that in the year 1821, about the 24th of *December*, *Jacob* came and requested him to write a few lines in the form of a will, for him. That he drew it, and in about a week took it to his brother, who read it over twice, looked very sober, and said, it was the very thing he wanted for some time; that he had applied to some people, and could not have it done. That he heard no more of it, until some time in *April*, when upon being sent for by his brother, he came, and that he seemed glad to see him, and told *Eli*, (the principal devisee,) to go to the chest and bring a paper. That *Jacob* took it in his hand, and opened it. That he put his hand down and said, "Brother *Emanuel*, I call thee as a witness to this my will." That *Emanuel* said he could not conveniently be a witness, and that others were sent for for that purpose, who did not come until *Jacob* was incapable of making a will.

If we believe *Emanuel*, he was not instructed to draw a will, but the mere form of a will, and *Jacob* upon its being presented said, "That is what I want." It cannot with any degree of propriety be said, that this was considered by *Jacob* as his will until *April*; for it is evident, that he intended it as the mere form of a will to be authenticated by his signature, or by some acknowledgment in the presence of witnesses, or by some other unequivocal act.

I do not, therefore, consider *Emanuel* as a complete witness, superior to all exceptions, within the true intent and meaning of the case of *Eyster v. Young*. Unless this rule be rigidly adhered to, there will be great danger of imposture by the aid of perjury and corruption, when the will, as in this case, is not in the handwriting of the testator, nor authenticated by his signature. It was to guard the death-bed of such a man as *Jacob Reynolds*, that the act of assembly requires the will to be in writing, and to be proved by two credible witnesses.

But, supposing *Emanuel Reynolds* to be a complete witness, superior to all exceptions, the next question, is whether there be another witness to the will, or the proof of such circumstances as amount to one witness.

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The rule which more immediately bears on this branch of the case, is distinctly laid down in *Hawk v. Hawk*, 6 Serg. & Rawle, 47.

The execution of a will must be proved by two witnesses, each of whom must separately depose to all facts necessary to complete the chain of evidence; so that if one witness only were required, the will would be fully proved by the evidence of either.

It is contended, that the necessary proof is furnished by the testimony of *Mary Sergeant* and *Samuel Lea*.

Mary Sergeant says, that *Jacob* told her, he had made his will, and would not alter it for any one; he had left it (meaning his estate) to *Eli* and *Hannah*. He said he thought they had the best right to it; and he said he had got his brother *Emanuel* to write his will.

Samuel Lea says, that he told *Jacob* he had brothers enough to leave his land to. He said his brothers should be no heirs to his land. He had bought it himself and paid for it, and would do as he pleased. Said he had made a will, and willed it all to *Emanuel Reynolds'* son *Eli*. He allowed *Eli's* sister to have half of his personal estate. He allowed *Eli* to enjoy it as his own property.

The instrument to which this evidence is said to apply, is in the handwriting of *Emanuel*, and is not authenticated by the signature of *Jacob*. The only evidence of the instructions for the drawing the will, is from *Emanuel*, who is the only witness, that but one will was drawn. It is stated by him, he had his instructions for drawing the will signed by *Jacob*, which are not produced, nor is there any account given of them.

Strike out the testimony of *Emanuel*, according to the authority of *Hawk v. Hawk*, and what proof is there that the will produced by *Emanuel*, is the same that the witnesses speak of, or rather that *Jacob* referred to in speaking to *Mary Sergeant* and *Samuel Lea*? As the proof of the execution of the will is matter of law for the court, it should not be left to inference or conjecture, but should in this particular be positive and direct.

Mary Sergeant says, that *Jacob* said, he had made his will, and had left his estate to *Eli* and *Hannah*.

By the will produced by *Emanuel*, the land is left to *Eli*, and the personal estate is divided between *Eli* and *Hannah*.

Samuel Lea says, that *Jacob* told him he had made his will, and willed his land to *Emanuel's* son *Eli*, and that he allowed *Eli's* sister to have the half of his personal estate.

He does not state who was to have the other half of the personal estate, nor do we certainly know, from his evidence, which sister was meant, and we can conjecture which, only from the circumstance, that at the time they were speaking, *Hannah* looked out of the door.

Except from *Emanuel* himself, we have no evidence but that

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he may have drawn more than one will for his brother *Jacob*, to which the testimony of *Mary Sergeant* and *Samuel Lea*, would more accurately apply.

Upon the whole case, I am of opinion, that the testimony of *Mary Sergeant* and *Samuel Lea*, do not amount to one witness, within the meaning of the act of 1705.

HUSTON, J., was absent in consequence of indisposition.

Judgment affirmed.

[LANCASTER, JUNE 6, 1827.]

The FARMERS' BANK of Lancaster *against* WHITEHILL.

IN ERROR.

An *ex parte* affidavit of a notary's clerk cannot be given in evidence after his death, to prove notice of non-payment of a promissory note to the indorser.

Nor is evidence admissible that the clerk inquired where the indorser lived, declaring that he was going to serve him with notice; accompanied by proof that after having received the information, he set off in the direction of the indorser's residence.

ON the return of the record of this case, accompanied by two bills of exceptions to evidence, from the Court of Common Pleas of Lancaster county, it appeared that it was an action brought by the plaintiffs in error, against the defendant in error, *James Whitehill*, on a promissory note of which the latter was an indorser.

One of the principal subjects of controversy, on the trial, related to proof of demand of payment on the drawer, and notice of non-payment to the defendant. The protest was produced and proved by the notary, who also swore that he never served notices himself in the county, but for several years employed *John Buck* to serve his notices. That *Buck* died after the commencement of this suit, and after an award of arbitrators in favour of the plaintiffs, from which the defendant appealed in consequence of the want of proof of the serving of notice. The notary, on being informed that this was the cause of the appeal, and the ground of defence, took the deposition of *Buck*, without a rule of court, or any notice to the defendant, and this deposition the plaintiffs' counsel offered in evidence, to prove a demand of payment and serving of notice. It was objected to on the part of the defendant, and rejected by the court, to whose opinion an exception was taken.

After having proved by the testimony of *Henry Cassel*, that notice of the protest of the note had been served on him as one of the indorsers, by *John Buck*, the plaintiffs offered to prove, that *Buck*

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observed to him that he had to go up above *Maytown* to serve notice on *James Whitehill*; upon which the witness informed him that *James Whitehill* lived in *Marietta*, and at *Buck's* request, gave him instructions where *Whitehill* lived; on receiving which *Buck* rode off to go to *Whitehill's*.

This evidence was also objected to by the defendant's counsel, and the court having rejected it, a second bill of exceptions was tendered and sealed.

On the argument in this court, *Hopkins*, for the plaintiffs in error cited, 15 *Mass. R.* 380, as settling the principle embraced by both bills of exceptions in a stronger case than that before the court. He referred also to 20 *Johns.* 168. *Phill. Ev.* 202, 203.

Buchanan, contra, was stopped by the court, the opinion of which was delivered by

DUNCAN, J.—The general objection to the deposition of *John Buck* is that it is in the nature of hearsay evidence, and that the defendant had no opportunity of cross examination; and unless there has been a relaxation of, and departure from the rules of evidence established for ages, the deposition, or rather *ex parte* affidavit, was properly overruled. The rules of evidence are of great importance, and a departure from them without necessity, or unless expediency or general convenience require a modification adapted to the actual business and transactions of life, would endanger private as well as public rights. To a certain extent these rules have been relaxed, and on the very subject of protest; for it has been recently settled, that the memorandums made at the time by a person in the ordinary course of his business, of acts and matters which his duty in such business required him to do for others, are admissible evidence of the acts and matters so done after his death. *Nicholas v. Webb*, 8 *Wheat.* 326. 15 *Mass. R.* 381. But if he is living he must be called, and may make use of those entries to refresh his memory; and if he then undertakes to swear to those facts from memory refreshed by and depending on the entries, he is competent to prove the fact; but the book of memorandums is not so, as evidence to the jury. The witness uses them to refresh his memory as to times, names, and quantities. *Smith v. Lane*, 12 *Serg. & Rawle*, 87. And in *The Philadelphia Bank v. Officer's Executors*, 12 *Serg. & Rawle*, 49, if the party is dead or beyond the reach of the court, where there cannot be a personal examination on oath, then but not before, the question arises whether such memorandums and entries, to prevent a total failure of justice, are admissible. There the secondary evidence is admitted to prove facts where ordinary prudence cannot guard against the effects of mortality or departure of the witness beyond the jurisdiction of the state. But there is no memorandum by *Buck* made at the time, of his daily acts and service of notice. Here the witness was alive, and this very matter was put in issue, and an opportunity given to perpetuate his testimony. It is neither more nor less than an *ex parte* affidavit, taken

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without rule of court and without notice to the party, and was properly rejected.

Most of this reasoning will apply to the second bill of exceptions, which was not even the hearsay from *Buck*, that he had served the notice, but a declaration of his intention to do it, his inquiry where he could find *Whitehill*, directions given to him, and his turning off in that direction with the declared purpose of serving it. If *Buck's ex parte* affidavit was inadmissible, the objection to this species of testimony is much stronger. Here the bank had an opportunity of proving the fact by *Buck* himself; they neglect to take this legal course; this never can be supplied by any declaration of *Buck's*. It was not a part of the *res gesta*, because it was offered as evidence of the fact itself. It did not prove any thing to have been done, but was a declaration of an intention to do it. If the deposition had been taken under a rule in the cause, but notice had not been given or irregularly given, it could not have been read. On what principle, then, can it be maintained, that because notice has not been given, and there was no rule, and the primary evidence neglected, it shall be supplied by this kind of hearsay, under the name of secondary evidence? The party had better evidence, the best evidence in his power, he has taken that evidence improperly; shall he then be suffered to prove what his witness said of his intention to do any act, when his best evidence from the witness that he had done that act, is neglected?

I do not know that any necessity would justify such a departure from the fundamental rules of evidence, of requiring the best evidence of a fact, as to let in evidence of the motion of a witness towards doing a particular thing required by law, and his declaration of an intention to do it, as evidence of having done it. But here the evidence required by law was in the party's power, and it comes to this, surround it with circumlocution as you may, whether an *ex parte* affidavit is evidence to go to a jury to prove a fact in issue and on trial between the parties. This evidence, likewise, was properly overruled, and the only question before us is, were these decisions right? It is quite plain that they were; so plain that the court did not think it proper to hear the counsel for the defendant in answer to the exceptions.

Judgment affirmed.

[LANCASTER, JUNE 6, 1827.]

HENDEL and others, Executors of MYERS, *against* The President, Managers, and Company of the BERKS and DAUPHIN TURNPIKE ROAD.

IN ERROR.

If in a suit brought by a corporation upon articles of agreement, the style of the corporation named in the agreement offered in evidence, differs from that in which the suit is brought, and some evidence has been given to the court to show that there has been a mistake in the name, and that in truth the agreement offered in evidence was made with the corporation which brought the suit, the court ought, under the plea of *non est factum*, to permit the agreement to be read to the jury.

If the original cause of action be compromised by an agreement, the defendant cannot in a suit on the agreement recur to the original grounds of controversy.

Where a record has been given in evidence without objection to the court and jury, it is error to refuse to permit it go out with the jury.

WRIT of error to the Common Pleas of *Lebanon* county.

This case had on two former occasions been before the court; first, at *May* Term, 1820, when the judgment entered in favour of the defendant in the court below was reversed, (6 *Serg. & Rawle*, 121,) and again at *May* Term, 1824, when a second judgment in favour of the defendant was also reversed. (11 *Serg. & Rawle*, 123.)

In the court below it was an action of covenant brought by the president, managers, and company of the *Berks* and *Dauphin* turnpike road against *William Hendel*, *W. J. Richards* and *D. Myers*, executors of *John Myers*, deceased, in which the plaintiff declared—"For that whereas, heretofore, to wit, on the 29th of *April*, 1817, at the county aforesaid, by certain articles of agreement in writing then and there made between the said *John Myers*, esq., of the one part, and *Christian Lay*, president, *Christian Snavely*, treasurer, and *W. Ward*, secretary, on behalf of the said company of the other part, (which said articles of agreement sealed with the seal of the said company and the seal of the said *John Myers*, esq.; the said president, managers, and company, now bring here in court, the date whereof is the day and year aforesaid;) it was agreed as follows—'Whereas a dispute has existed between the *Berks* and *Dauphin* turnpike company, (intending thereby to name and describe the president, managers, and company of the *Berks* and *Dauphin* turnpike road, and the plaintiffs in this suit,) and *John Myers*, esq., respecting twenty-five shares of stock subscribed by the said *John Myers*, and in order to settle and put an end to the said dispute it is this day agreed by and between the said *John Myers* and the said company, (intending thereby to name

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and describe the president, managers, and company of the *Berks* and *Dauphin* turnpike road, and the plaintiffs in this suit) as follows, to wit:—The said *John Myers* agrees to take and to keep the said twenty-five shares of stock so as aforesaid subscribed, and to pay the same as follows, that is to say the sum of two hundred and fifty dollars, part thereof on the 1st day of *October* next, and the remainder thereof in payments of two hundred and fifty dollars, on the 1st day of *April* in each year, until the whole sum of one thousand two hundred and fifty dollars is paid without interest, and further, that the legal costs of the suit brought, except counsel fees, be paid by and between the said parties in equal shares. And the president, managers, and company of the *Berks* and *Dauphin* turnpike road in fact say, that the *Berks* and *Dauphin* turnpike company named as a party to the articles of agreement aforesaid, was in fact intended to be the name and description of the plaintiffs in this suit, and that in fact and truth there is no such artificial person or body politic having the corporate name of the *Berks* and *Dauphin* turnpike company, and that the *Berks* and *Dauphin* turnpike company on whose behalf the said *Christian Lay*, president, *Christian Snively*, treasurer, and *W. Ward*, secretary, in the said articles of agreement mentioned, did agree, is the same corporate body named as the plaintiffs to this suit,' " &c.

The defendants pleaded *non est factum*, covenants performed, *non infregit conventiones*, and a former suit pending.

The plaintiffs having produced the article of agreement referred to in the declaration, examined *Samuel Valentine*, the subscribing witness, who said, "This is my handwriting as a witness to this paper. It was in my father's house, *Michael Valentine*: I was called over to sign it as a witness, and *John Myers* allowed it to be his hand and seal. They had been making an agreement, and I was called as a witness to it. I cannot say whether he had signed it before I went in or not. He acknowledged his hand and seal. It was all written I think when I went over to them. *Christian Lay*, *Christian Snively*, and Dr. *Wood* were present. On his cross examination the witness said, I cannot say whether the seal of the corporation was on it at that time or not; I have seen the paper before often. I have been examined before. I think that nothing was written under my name at the time. If there had been any writing there, I would have signed below it. I think they had a seal there, and I saw the press. I saw the press, but cannot say whether it was there or not. I cannot say whether I saw the seal there at that time for certain, but I think I did. It is eight or nine years ago. I do not recollect whether that seal (the seal of the corporation was then exhibited to the witness,) was to the paper or not at that time."

After the examination of *Valentine*, the plaintiffs offered in evidence an article of agreement, dated the 29th of *April*, 1817, signed, *John Myers*, *Christian Lay*, president, *Christian Sna-*

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vely, treasurer, *William Wood*, secretary, and to which the seal of the corporation was affixed. The counsel for the defendants objected to the admission of the instrument, and an exception was taken to their opinion.

When the plaintiffs had closed their evidence, the defendants gave in evidence the record of a suit brought in the court of Common Pleas of *Lebanon* county to *November* Term, 1816, by the president, managers, and company, of the *Berks* and *Dauphin* turnpike road against *John Myers*. *Christian Snavelly* was then called upon as a witness, and swore as follows: "The seal of the corporation was put to the instrument the same evening after *John Myers* signed the instrument. He was not present when the seal of the corporation was put on. The indenture was executed at *Myerstown*, at the house of *Michael Valentine*. *Christian Lay*; *Lewis Reese*, *Christian Snavelly*, *Samuel Addams*, *Henry Koppenhaeffer*, *Peter Lineweaver*, *William Wood*, and *Samuel Rea*; were present. I was not a manager, nor *William Wood*. *Abraham Raiguel* was there. There were two managers absent. The words 'The seal of the corporation' were written by Dr. *Wood*, the secretary at *Myerstown*, the same time the contract was executed. I saw *Myers* execute the agreement, also *Christian Lay*, and Dr. *Wood*, and the managers already mentioned, were in the room when they signed. I cannot say they saw them sign it. I was treasurer at that time, and keeper of the seal of the company."

After the witness had given the evidence above stated, the plaintiffs proposed to ask him on his cross examination, "Whether the seal of the corporation was affixed to the contract on which this suit was founded by order and direction of the managers present at *Myerstown*, on the day the contract bears date, and at the time it was signed, as the minute of this direction appears to have been kept by the secretary of the corporation in the minute book of the corporation;" to which evidence the defendants' counsel objected, but the court admitted it, and the defendants took a bill of exceptions.

The witness then proceeded thus: "I was directed by the managers then present to affix the seal to it in the presence of *John Myers*. I mean the managers already named by me. It was agreed that I should take the agreement home and put the corporation seal to it, and Mr. *Myers* told me I should call on Mr. *Wright* and inform him that he had settled with the turnpike company, and should show him the agreement if he wanted to see it. I next day told Mr. *Wright* this. On the former trial, I said that Mr. *Godwin*, in the presence of the managers and *John Myers*, told me to put the seal to it. I do not know whether *Myers* told me to put the seal to it or not. He assented to my taking it with me. *Myers* was next to me when I got the order and was near enough to hear it. I kept the agreement until the time of trial in *November*,

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1817. I was employed by the company to carry on the law suit; there is a minute of it. I subpoenaed witnesses to give evidence in the suit."

The defendants subsequently offered to prove that the original subscription for twenty-five shares was void; first, because *Myers* was drunk at the time; secondly, because no money was paid at the time of subscribing; thirdly, because the number (25) of shares was in a different handwriting; fourthly, because the company carried on the suit on the original subscription after the agreement had been entered into. The counsel for the plaintiffs objected to the evidence thus offered, except that part which relates to the former suit. The court sustained the objection, and the defendants' counsel excepted to their opinion.

After the court had delivered their charge, the jury were about to retire, but before the constable had been sworn, the defendant's counsel offered to send out with the jury the record of the suit of *November Term, 1816, No. 14*, given in evidence to the court and jury, to which the plaintiffs' counsel objected, and the court having sustained the objection, the defendants' counsel excepted to their opinion.

Among other matters, the court charged the jury, "That the company could legally enter into such an agreement with *John Myers*, as that given in evidence: that it might be entered into by a quorum of the managers, or by a committee appointed for that purpose, and whether the committee was duly appointed by a quorum of managers, and entered into the agreement, or whether a quorum of managers entered into it themselves, was a matter of fact for the jury, and might be proved by parol evidence, if there be no written evidence of such appointment, nor a minute made of it in the books of the company."

To this opinion the defendant's counsel also excepted.

On the return of the record to this court, the following errors were assigned:—

1. The court erred in admitting in evidence the articles of agreement of the 29th of *April, 1817*.

2. The court erred in permitting *Christian Snavely* to give parol evidence of the proceedings of the Board of Managers, which should have been in writing.

3. The court erred in not permitting the defendants below to prove that the original subscription of *John Myers* was void, and that the plaintiffs prosecuted the suit on the original subscription after the execution of the agreement of the 29th of *April, 1817*.

4. The court erred in not permitting the record of the suit to *November Term, 1816, No. 14*, to be taken out by the jury, the same being given in evidence.

5. The court erred in their charge to the jury.

These errors were argued by *Wright*, for the plaintiffs in error, and by *Weidman* and *Norris* for the defendants in error, who

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cited, *Peake's Ev.* 264, 265. 1 *Mass. R.* 5. 4 *Serg. & Rawle*, 494. 7 *Serg. & Rawle*, 273. 11 *Serg. & Rawle*, 123, 362. 13 *Serg. & Rawle*, 362.

The opinion of the court was delivered by

ROGERS, J.—It is my intention to notice but two points particularly, and to content myself with dismissing the other exceptions, with the single observation that they have not been sustained.

Under the plea of *non est factum*, when the deed offered in evidence corresponds with the instrument declared on, the only proof that is required is, by the subscribing witness, that the defendant signed, sealed, and delivered it as his act and deed. When it does not correspond, something more is necessary. You are required to show the identity of the instrument with that declared on. Thus, the suit is brought in the name of *John Styles*, and the bond is in the name of *William Styles*. Here there would be a variance between the declaration and the evidence, and some proof would be required, to show that the bond was in fact given to *John Styles*, although it purported to be given to *William*.

It appears that the corporate name of the plaintiffs was, The President, Company, and Managers of the *Berks and Dauphin Turnpike Road*, and by that name the suit has been correctly brought, with the proper averments necessary to meet the peculiar situation of the cause. The agreement offered in evidence purported to be, *John Myers* with The *Berks and Dauphin Turnpike Company*. Without doubt, under the plea of *non est factum*, the evidence should not have been received, for this reason, that it appears to have been made with a different company, and, for aught that there appeared, there might have been two agreements of *John Myers* with entirely different incorporations. It then became necessary to give some testimony to the court, to show that there had been a mistake in the name, or misnomer, and that in truth the agreement offered in evidence was made with the company who brought the suit.

Without particularly stating the evidence, or saying what might be its effects before the jury, who are the ultimate judges of the fact of the execution, and the identity of the instrument declared on, I have no doubt sufficient was offered to justify the court in permitting the agreement to be made to the jury.

In the progress of the cause, a record of a suit to the *November Term, 1816, No. 14*, was given in evidence to the court and jury. I say to the court and jury, for this is expressly stated in the record, which is our only guide. The contradictory assertions of counsel can have no weight here. If the record speaks differently from the truth of the fact, it is not the fault of this court. The record imports verity. After the court had charged the jury, and they were about to retire to deliberate on their verdict, and before the constable was sworn, the counsel for the defendant offered to

(Hendel and others v. The Berks and Dauphin Turnpike Road.)

send out with the jury this record. This was objected to, and the court sustained the objection, to which the counsel of the defendants excepted, and have assigned it for error in this court.

The rule in *Pennsylvania*, as I have always understood it, is, that all papers given in evidence in the trial of a cause, except depositions, are to be sent out with the jury. The inspection of the papers is indispensable; for without it, it would in many cases be next to impossible for the jury to come to any correct conclusion. The only reason why depositions are not also sent out is, because the witnesses examined at the bar are not permitted to accompany the jury.

The decision of the court has been attempted to be sustained by the allegation, that the evidence was given to the court under the plea of a former suit pending, and that the issues in fact and in law, were tried at the same time. The first allegation is contradicted by the record, and the second does not appear; for I cannot suppose that so irregular a practice, as the trial of both issues at the same time, has taken place in this cause.

It is objected, that the evidence was improperly received, and that there was, therefore, no error in preventing the record from going out with the jury. It may be remarked, that the evidence was given without objection; but was it in time to take this exception, which is not that it was improperly received, but that the record given in evidence without objection should not have been sent out with the jury? The furthest the courts have gone, (when they found themselves in error,) is to instruct the jury to disregard the testimony. In this, there would be no injustice, as the party would have his bill of exceptions, and would also, on a proper application to the court, have leave to supply the defect occasioned by the rejection of the evidence.

But was this record improper testimony? Without pretending to determine the effect of the evidence, I think it was not. One ground of defence was, that the company, after entering into the new agreement, still persisted in prosecuting the suit, which the agreement was intended to settle. If the jury should be of the opinion that the parties had abandoned the new agreement, the defence would be most valid and proper.

The decision of the court has also been defended, on the ground that it was contrary to a rule of court, which prohibits the parties from sending out the dockets with the jury.

If this clearly appeared, I should have no hesitation in saying the court were correct; for there is great inconvenience and danger in suffering the records of the court to be taken out by the jury. The party should be furnished with exemplifications of the record. As this, however, does not appear, I am constrained reluctantly, I admit, to say, that in not permitting the record to be taken out by the jury, there was error.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, JUNE 6, 1827.]

CHRISTINE and another, for the use of CHRISTINE, against
WHITEHILL.

IN ERROR.

It seems that the death of a party for whose use an action is brought in the name of another, is no reason for continuance, on the application of the representative of such party; but if the defendant objects to proceeding to trial, on the ground that there is no responsible party on the record, the court may, in the exercise of their discretion, continue the cause until such party is introduced.

Such points, however, are not properly the subjects of a writ of error, and it must be a flagrant case, which would induce this court to interfere.

In an action of covenant upon an alleged warranty of title, the defendant may, as the first link in his defence, give in evidence a warrant granting the land, "provided it is not in our manor of *Springettsbury*," notwithstanding the land does lie within the said manor.

A paper purporting to be an exemplification of the record of an Orphans' Court, stating that A. B. appeared and agreed to take certain lands at the appraisal, and containing the decree of the court assigning the said lands to him, without setting forth the other proceedings, and certified thus: "I certify, that the foregoing is a true copy taken from the original remaining in the office of the Orphans' Court of ——— county," is not admissible in evidence.

In an action founded upon a deed, a material part of the instrument cannot be contradicted or explained away by parol evidence, unless such part has been inserted through fraud or mistake. Nor can a deed be discharged by any declarations of the holder of it, as to what the deed does or does not contain.

But *it seems* that if the action were for deceit, in making a false assertion in the deed, the defendant might prove the circumstances under which the clause was introduced, independently of fraud or mistake.

In an action of covenant to recover back the purchase money of land, in consequence of a defect of title, it is not competent to the plaintiff to prove, that he had contracted to sell the land, and that the person with whom the contract was made, refused to complete the purchase, on discovering the alleged defect of title.

Where the plaintiff has been permitted, without objection, to give evidence, which in the existing state of the pleadings was liable to objection, he may, after the evidence on both sides is closed, and the argument commenced, amend his declaration so as to make it correspond with the evidence so given.

Query, Whether the words *grant* and *enfeoff*, in a deed, amount to a general warranty.

Any words in a deed, which show that a party asserted a thing to have been done, material to the contract, amount to a covenant that such thing has been done. Therefore, a recital in a deed, by the grantor, that the lands granted are part of a larger tract late the property of A. B. of, &c., deceased, which was decreed by an Orphans' Court, of, &c., held, &c., unto the grantor, one of the sons of the said A. B., deceased, and which the other heirs of the said A. B. did, by their deeds of release, grant and confirm to the said grantor, and to his heirs and assigns for ever, is a covenant that the grantor was seised of an estate in fee simple in the lands granted.

WRIT of error to the Court of Common Pleas of Lancaster county.

George Christine and *Andrew Gotwalt* brought this action of covenant, in the court below, for the use of *George Christine*,

(Christine and another, for the use of Christine, v. Whitehill.)

against *John M. Whitehill*, and declared against him, as follows:—

“*John M. Whitehill*, late of the county aforesaid, yeoman, was attached to answer *George Christine* and *Andrew Gotwalt*, who sue for the use of the said *George Christine*, of a plea that he keep with them his covenants, according to the force, form, and effect of a certain indenture between them made; whereupon the said *George Christine* and *Andrew Gotwalt*, by *James Hopkins*, their attorney, complain that on the 27th day of *July*, in the year of our Lord one thousand eight hundred and fourteen, at the county aforesaid, the said *John M. Whitehill* and *Elizabeth* his wife, by their certain indenture, bearing date the day and year aforesaid, which is now here shown to the court, amongst other things, in consideration of twelve hundred dollars lawful money of *Pennsylvania*, by the said *George Christine* and *Andrew Gotwalt* to the said *John M. Whitehill* and *Elizabeth* his wife, in hand paid, did grant, bargain, and sell, alien, enfeoff, release, and confirm to the said *George Christine* and *Andrew Gotwalt*, their heirs and assigns, a certain tract of land situate in *Hellam* township, in the county of *York*, by metes and bounds in the said indenture particularly described and set forth, containing ten acres neat measure, being part of the fifty-eight acres and one hundred perches, late the property of *John Whitehill* of *Donegal* township aforesaid, which was decreed by an Orphans’ Court of *York* county aforesaid, held the 15th day of *September*, 1812, unto *John M. Whitehill*, (meaning the said *John M. Whitehill*, one of the sons of the said *John Whitehill*, deceased,) and which *James Whitehill* and others, the heirs of the said *John Whitehill*, deceased, did, by their deed of release, grant and confirm unto the said *John M. Whitehill*, (a party hereto,) and to his heirs and assigns for ever, to have and to hold the said ten acres of land, with the appurtenances, unto the said *George Christine* and *Andrew Gotwalt*, their heirs and assigns for ever, subject to the quit rent due thereon, or to become due to the proprietary, Mr. *Penn* and his heirs. And, further, the said *John M. Whitehill* and *Elizabeth* his wife, in and by the said indenture, amongst other things, did covenant, promise, grant, and agree to and with the said *George Christine* and *Andrew Gotwalt*, as follows, that is to say, “And the said *John M. Whitehill* and *Elizabeth* his wife, for themselves, their heirs, executors, and administrators, did covenant, promise, grant, and agree, to and with the said *George Christine* and *Andrew Gotwalt*, their heirs and assigns, that they, the said *John M. Whitehill* and wife and their heirs, the said above described ten acres of lands, hereditaments and premises, hereby granted and released (or mentioned or intended so to be,) with the appurtenances, unto the said *George Christine* and *Andrew Gotwalt*, their heirs and assigns, against them the said *John M. Whitehill*, and *Elizabeth* his wife, and their heirs and assigns. and against all

(Christine and another, for the use of Christine, v. Whitehill.)

and every other person or persons whomsoever, lawfully claiming or to claim the said above described ten acres of land, or any part thereof, shall and will warrant and for ever defend by these presents," as by the said indenture fully and at large appears. And the said *George* and *Andrew*, afterwards, to wit, on the same day and year, entered into the possession of the said ten acres with the appurtenances, having paid and satisfied the said *John M. Whitehill* and *Elizabeth* his wife, the said twelve hundred dollars, as fully appears by his receipt duly executed therefor, by the said *John M. Whitehill* upon the said indenture. And the said *John* and *Andrew* aver, that on the day and at the time of executing the said indenture, to wit, on the 27th of *July*, in the year of our Lord one thousand eight hundred and fourteen, or at any time before, neither he the said *John M. Whitehill*, nor his father, the said *John Whitehill*, deceased, had any lawful right or title to the said ten acres, or any part thereof, or property therein, or to or in the said fifty-eight acres, and one hundred perches of land, or any part thereof, represented, stated, and declared by the said *John M. Whitehill* in the said indenture to have been the property of his said father *John Whitehill*, deceased, at the time of his death, of which he the said *John M. Whitehill*, in and by the said indenture, represented, stated, and declared the said ten acres to be part, and that no lawful right or title ever was derived to the said *John M. Whitehill* from his said father, under or by virtue of the aforesaid decree of the said Orphans' Court of *York* county, nor did the said *James Whitehill* and others, the heirs of the said *John Whitehill*, deceased, by their deed of release, grant and confirm unto the said *John M. Whitehill*, his heirs and assigns, the said ten acres with the appurtenances, or any part thereof, as the said *John M. Whitehill* has represented, stated, and declared in the said indenture; but that, at the time of the sealing and delivery of the said indenture, and at the time of the death of the said *John Whitehill*, the lawful right and title to the said ten acres and the appurtenances, and to the said fifty-eight acres and one hundred perches of land were vested in *John Penn* and *Richard Penn*, late proprietaries of *Pennsylvania*, as part of their manor of *Springettsbury* in the said county of *York*. And so the said *George* and *Andrew* say, that the said *John M. Whitehill* fraudulently and deceitfully represented, stated, and declared, in the said indenture to the said *George* and *Andrew*, that the said ten acres of land, with its appurtenances, was the property of the said *John Whitehill*, deceased, at the time of his death; that the said ten acres became vested in him and his heirs and assigns by the aforesaid decree, and the release of the said *James Whitehill*, and the other heirs of the said *John Whitehill*, deceased, when in truth and in fact no such right and title was vested in his said father, *John Whitehill*, or in the said *John M. Whitehill*, or in the said *James Whitehill*, and others the heirs of the said *John Whitehill*,

(Christine and another, for the use of Christine, v. Whitehill.)

deceased, at the sealing and delivery of the said indenture, or at any time before, whereby the said *John M. Whitehill* hath not kept with them his covenants aforesaid, but hath broken them.

“And the said *George* and *Andrew* further aver, that the said *John M. Whitehill* hath not kept and fulfilled his covenant of warranty aforesaid; but hath broken the same in this behalf, that at the time of the sealing and delivery of the said indenture he the said *John M. Whitehill* had no lawful right and title to the said ten acres of land neat measure, with the appurtenances, nor was he lawfully seised in fee simple thereof, nor had he right or title to convey the same; but that the lawful right and title to the same, at the time of the execution of the said indenture, was vested in *John Penn* and *Richard Penn*, who were lawfully seised in fee simple of the said ten acres, with the appurtenances, as part of their manor of *Springettsbury*, in the county of *York* aforesaid, and that the said *John Penn* and *Richard Penn* afterwards, to wit, on the first day of *November*, in the year of our Lord one thousand eight hundred and sixteen, entered into possession of the said ten acres of land, with the appurtenances, and evicted the said *George* and *Andrew* out of the same, and now lawfully hold the same in fee simple, and so the said *George* and *Andrew* say that the said *John M. Whitehill* hath not performed his said covenants, but hath broken the same, to the damage of the said *George* and *Andrew* three thousand dollars, and therefore they bring suit,” &c.

The defendant pleaded performance, with leave, &c., to which the plaintiffs replied that he did not perform, and issue.

When the cause was called for trial, the death of *George Christine*, for whose use the suit was brought, was suggested, and no process having issued to make his administrators parties, and they not having become so, his former counsel moved to continue the cause, on the ground that there were no parties to the suit. But the court being of opinion that while *Andrew Gotwalt* was living there was a plaintiff who was a party to the suit, decided that the death of *George Christine* was no cause for a continuance. This decision was the basis of the first bill of exceptions.

After the jury had been sworn, the plaintiff gave in evidence a deed bearing date the 27th of *July*, 1814, from *John M. Whitehill* to *George Christine* and *Andrew Gotwalt*, the material parts of which were in these words:—

“Witnesseth, that *John M. Whitehill* and wife, in consideration of twelve hundred dollars, have granted, bargained, and sold, aliened, enfeoffed, released, and confirmed, and do grant, bargain, and sell, alien, enfeoff, release, and confirm to *George Christine*, and *Andrew Gotwalt*, and to their heirs and assigns, all the following described piece or parcel of land, situate and being in *Hel-lam* township, and bounded and limited as follows:—Beginning at a rock at the river *Susquehannah*, thence, south, &c. to the place of beginning, containing ten acres neat measure, being part

(Christine and another, for the use of Christine, v. Whitehill.)

of the fifty-eight acres and one hundred perches of land, late the property of *John Whitehill*, of *Donegal* township aforesaid, deceased, which was decreed by an Orphans' Court of *York* county aforesaid, held the 15th of *September*, 1812, unto *John M. Whitehill*, a party hereto, one of the sons of the said *John Whitehill*, deceased, and which *James Whitehill* and others, the heirs of the said *John Whitehill*, deceased, did by their deed of release, grant and confirm unto the said *John M. Whitehill*, a party hereto, and to his heirs and assigns for ever."

The plaintiffs then gave in evidence the warrant to survey the manor of *Springettsbury*, dated the 21st of *May*, 1762, and the return of the survey thereon, dated the 12th of *July*, 1768, and proved that the land described by the deed, lay within the said manor. The plaintiffs having given notice to the defendant to produce a deed from the proprietaries or owners of the manor of *Springettsbury*, to himself, he produced one dated the 19th of *July*, 1822, from *John* and *William Penn*, to *Jacob Strickler* and *John M. Whitehill*, for a tract of land, including the ten acres which were the subject of the present controversy. The plaintiffs having read the last-mentioned deed to the jury, rested their case.

The defendant then, for the purpose of showing a good title in himself when he conveyed to the plaintiffs, offered in evidence a warrant to *James Bailey*, dated the 15th of *April*, 1763, for a tract of land, including that which the deed of the 27th of *July*, 1814, given in evidence by the plaintiffs, purported to convey, together with the survey made thereon, dated the 25th of the same month. The warrant granted the land to which it referred, "provided it is not within our manor of *Springettsbury*:" on this ground the plaintiffs' counsel objected to the evidence offered. The objection, however, was overruled by the court, to whose opinion the defendant's counsel excepted.

After having shown title in *John Whitehill*, the father of the defendant, derived under the above-mentioned warrant to *James Bailey*, the defendant offered in evidence an exemplification of the record of the Orphans' Court of *York* county, dated the 15th of *September*, 1812. This paper did not set out the proceedings of the Orphans' Court, but merely stated that *John M. Whitehill* appeared and agreed to take certain lands at the appraisement, and contained the decree of the court, assigning those lands to him. It was certified thus: "I certify that the foregoing is a true copy, taken from the original record remaining in the office of the clerk of the Orphans' Court of *York* county." The court admitted the paper in evidence, though objected to by the counsel of the plaintiffs, at whose request another bill of exceptions was sealed.

The defendant proposed to prove, by *William Childs*, who drew the deed of the 27th of *July*, 1814, that when applied to for that purpose, *John M. Whitehill* and *George Christine* alone were present; that Mr. *Whitehill* said, "I have not the releases

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from my brothers and sisters, but will obtain them in a very short time." *Christine* said he was satisfied. Mr. *Whitehill* was sufficient to him. I believe I made the remark that if Mr. *Whitehill* was certain of obtaining them in a short time, I would insert it in the deed that they were obtained. It was agreed by them both that I should. Mr. *Christine* then remarked, he must have a warranty title.

The defendant further offered to prove, by *John Smith*, that in 1814, *John Smith* told him, that Mr. *Whitehill* had not got the releases at the time the title was made, but he was to get them shortly, as soon as he could conveniently obtain them; but observed that Mr. *Whitehill* was always good enough to him. The testimony of both these witnesses was objected to by the plaintiffs' counsel, but the court received it, and an exception was taken.

Evidence was then offered by the plaintiffs, that on the 30th of *November*, 1816, *George Christine* had made an agreement to sell the land conveyed to himself and *Andrew Gotwalt*, but that the person with whom the agreement was made, on discovering that his title was good for nothing, refused to complete the contract. The counsel of the defendant objected to the evidence, and the court having rejected it, another bill of exceptions was tendered by the plaintiffs and sealed by the court.

The evidence on both sides being closed, one of the counsel for the defendant began to address the jury. In the course of his argument, he contended that the breaches assigned in the declaration having stated that the title to the manor of *Springettsbury* was in *John* and *Richard Penn*, and it appearing from the deed of the 19th of *July*, 1822, to *Jacob Strickler* and *John M. Whitehill*, given in evidence by the plaintiffs, that the title was in *John* and *William Penn*, the evidence did not correspond with the declaration, and consequently the plaintiffs could not recover. The plaintiffs' counsel thereupon made to the court a motion in the following form:—"The defendant having been regularly notified to produce the title he obtained for the lands in dispute from the proprietaries of the manor of *Springettsbury*, and having withheld the same until it was fully established that he had the same in his possession, and, on the production of the same, it appearing that *John* and *William Penn* are the proprietaries of the manor, and not *John* and *Richard Penn*, as stated in the declaration, the plaintiffs move, after one of the defendant's counsel had begun to address the jury, to change the name of *Richard*, where it occurs in the declaration, to *William*." This motion was opposed on the part of the defendant, and the court refused to permit the amendment to be made; upon which the plaintiffs' counsel took another exception.

Several legal propositions were submitted by the counsel on both sides to the court, who delivered to the jury a charge, of which the following parts are material:—

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“I have already stated the opinion of the court, that neither *John Whitehill* the father, nor *John M. Whitehill* the son, had any title to the lands conveyed. And it appears in testimony that no releases were executed at the time of the conveyance, by the heirs of *John Whitehill*; and the question is, whether under these circumstances there is any thing in the deed which will warrant an action of covenant.

“We have all listened with great attention to the elaborate and ingenious arguments delivered on both sides of this question; I have given it all the consideration it deserves, and it is my opinion, after full deliberation, that the deed of the 27th of *July*, 1814, doth not contain an agreement or covenant, that the title in fee simple was vested in *John Whitehill* at his death, and on that event descended to *John M. Whitehill*, the defendant, and his brothers and sisters, and that upon an appraisement under the intestate law it was decreed to him and his heirs by the Orphans’ Court of *York* county. All this is stated in the deed, but not in such terms as amount to a covenant, on which an action can be sustained. It is not stated in the declaration as a covenant. There is no covenant in the deed, that the defendant or his father was seised of an indefeasible title, and therefore there is no covenant to warrant the breaches assigned in the declaration. Admitting the truth of the allegations in the first count, they would not form the subject of an action of covenant; but might probably be a good ground for an action on the case for deceit.

“The facts stated in the several counts, are, that *John M. Whitehill*, at the time he made the deed, had no title to the ten acres, nor any right to convey the same. 2dly, That the lawful right and title to the same, at the time of the execution of the deed, were vested in *John* and *Richard Penn*, or the proprietor of the manor of *Springettsburg*; and, 3dly, That *John* and *Richard Penn* entered into possession of the ten acres, with the apportionances, and evicted the said *George Christine* and *Andrew Gotwalt* out of the same.

“To entitle the plaintiffs to recover, they must prove each of their allegations—they have proved the title not to be in the defendant, but as they have alleged that the property in dispute was owned by *John* and *Richard Penn*, it is necessary for the plaintiffs to prove it, and proof that the property belonged to any other person will not be sufficient.

“It must be proved also, on behalf of the plaintiffs, that they were actually evicted under the paramount title stated in the declaration, as vested in *John* and *Richard Penn*. The warranty is not broken without an eviction, and the eviction is alleged in the declaration, and must be proved. It is true that the evidence of the paramount title stated in the declaration, and that the plaintiffs in consequence, yielded up the possession to such title, would be sufficient, and would support the allegation of eviction; for the law

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does not require, in the language of one of the judges of the Supreme Court, the idle and expensive ceremony of being turned out by legal process when that result would be inevitable."

Hopkins, for the plaintiffs in error, cited, 9 *Serg. & Rawle*, 22. 2 *Schw. N. P.* 39. *Sugd. on Vend.* 260. 3 *Johns. R.* 45. *Bull. N. P.* 156. 2 *Freem.* 3. *Powell on Cont.* 237. *Fromberger v. Bender*, 4 *Dall.* 444, 446. *Funk v. Voneida*, 11 *Serg. & Rawle*, 364. 4 *Mass. R.* 349.

Rogers and Jenkins, contra, cited, *Edmiston v. Swartz*, 13 *Serg. & Rawle*, 135. *Voris v. Smith*, 13 *Serg. & Rawle*, 334. 5 *Serg. & Rawle*, 382. 8 *Mass. R.* 201. 7 *Mass. R.* 261. 1 *Esp. N. P.* 267, 268. 7 *Johns. R.* 258. 11 *Johns. R.* 122. 2 *Caines' R.* 192. *McKay v. Brownfield*, 13 *Serg. & Rawle*, 239. *Whart. Dig.* 253. *pl.* 382.

HUSTON, J.—This was an action of covenant brought by the plaintiffs in error, against the defendant in error, and affords a striking example of the pertinacity with which every point of law and of practice is now contested in this state. The fact that we have no Court of Chancery, and that the powers of such a court are exercised by a court and jury, is well known, and has been the subject of much remark. I do not consider it a defect in our judicial system—nay, if the power of granting injunctions, of sustaining a bill for discovery, and of directing specific performance, at the same time imposing proper terms on the other party, were granted to our courts, I would say our system is preferable to that of *England*, or of those states where the two courts are kept distinct. I am aware, however, that in practice some difficulties occur; that the proper mode of proceeding remains to be settled in some instances. The assignee of a bond, can by act of assembly support suit in his own name, where the assignment is evidenced by two witnesses. In most other cases where a right is transferred, the suit is by the assignor for use of assignee. Here we call the assignor the legal party on the record; but he is not the real party for almost any purpose. He cannot release or discontinue the action—is not liable for costs—is not the proper person on whom to serve notice to take depositions, or other notices in the cause: in short, he is the formal, though not the real plaintiff. The practice has been, perhaps, as was pursued in this case, to consider the death of the person for whose use suit was brought, as not a reason of continuing the cause. The legal parties being in full life, the trial has been considered regular. If, however, the defendant had objected to the trial proceeding, until the representatives of *Christine* were substituted, if the defendant had objected that he had no party on whom to serve notice, no party against whom he could issue execution for costs, a judge would exercise a sound discretion in continuing the cause until such party was put on the record. The fact is, that this and such points are not properly the subject of a

(Christine and another, for the use of Christine, v. Whitehill.)

writ of error, and it must be a flagrant case—a great and final injury to the party, or this court would not reverse, even if they might incline to the opinion that the judge ought to have acted otherwise. By our practice, the plaintiffs might, on motion, have substituted the legal representatives of *Christine* instantly.

The plaintiffs gave in evidence a deed from the defendant to *Christine* and *Gotwalt*, dated the 27th of *July*, 1814, (on this deed the principal question arose,) and proceeded to show title in *John* and *Richard Penn*. *Richard's* part had become vested in *William Penn*, and having given notice to the defendant, he produced it. The plaintiffs read a deed from *John* and *William Penn*, to *Jacob Strickler*, and the defendant, *John M. Whitehill*, in fee, dated the 19th of *July*, 1822, and rested his cause.

The defendant then offered in evidence a warrant to *James Bailey*, dated the 15th of *April*, 1763, and return of survey thereon, under seal of office, alleging that he would deduce title under it, and that it was a good title. The plaintiffs objected to this warrant and survey being received in evidence, because the warrant expressly grants the land, “provided it is not within our manor of *Springettsbury*.” If the defendant had admitted that the land lay within that manor, that neither possession nor any other fact had occurred since the date of the warrant on which he meant to rely; in short, had admitted that the validity of that warrant must depend on whether it gave title to lands within the manor the day it issued, or the day it was returned,—the court might have been right in rejecting it; for clearly, if evidence will not avail the party, it ought not to be received: but the validity of the title under it might depend on so many occurrences since its date, that it ought to have been received as the first link in a defence, and its effect would depend on what was afterwards proved. There was then no error in this.

After deducing title from *James Bailey* to the defendant's father, the defendant offered in evidence what he called an exemplification of the records of the Orphans' Court of *York* county. The paper purports to be the record of the proceedings of the Orphans' Court of *York* county, at a court held on the 15th of *September*, 1812. It begins by stating what had been done at a former court, and contains only that *John M. Whitehill* appeared and agreed to take certain lands at the appraisement, and the decree of the court assigning them to him, &c. There is no mention of a petition, much less a copy of it; no award of inquisition, nor no inquisition. The certificate is in these words: “I certify that the foregoing is a true copy taken from the original record, remaining in the office of the clerk of the Orphans' Court of *York* county.” The two cases of *Edmiston v. Swartz*, and *Voris v. Smith and Wife*, in 13 *Serg. & Rawle*, have put the admissibility of a record expressly on the certificate. I agree entirely with those opinions, but I would wish the certificates and the state of

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the records offered had been expressly given; for an opinion is often, if not always, referrible to the case in which it is delivered. In the first case, it appears the certificate stated it to be a true copy taken from the records, and had the words, "so fully and entire as it remained in the court," and I know the last had the same words. Our records are never made up in one roll. A narr—an execution—or inquisition is sometimes not found, when the record of an old suit is searched for, and we must take what we have. Neither of those purported to be the proceedings of the court at a single session or term. In the case before us, we know the petition must be presented at one term or session of the court. The inquest, if then awarded, cannot be returned until the next stated Orphans' Court, and the heirs are then notified to appear, and accept or refuse at a succeeding court—here we have only the proceedings at this third court, and nothing from which we can suppose the previous proceedings are not all in existence; if lost, and the officer would certify what he had, and add, that this was a copy of the records of the Orphans' Court, in that case, "*so full and entire as in his office they remained,*" I would receive it, and it might or might not avail the party, as though it was entire. Here is no such thing: it is a copy taken from the record, and purports only to contain the decree, without the premises, or what had been done at previous courts. I am of opinion it was improperly received. The counsel who are to produce a record, ought always to examine it; and, if any part is wanting, to see that the certificate states it to contain all that now is in the office. This point was expressly decided in *Hampton v. Speckenagle*, 9 Serg. & Rawle, 221.

The defendant then called *William Childs*, the scrivener who drew the deed, and offered to prove, that when he was applied to, to draw the deed, *John M. Whitehill* and *Christine*, and no other persons, were present. That Mr. *Whitehill* said, "I have not the releases from my brothers and sisters, but will obtain them in a very short time." *Christine* said he was satisfied. Mr. *Whitehill* was sufficient to him. "I believe I made the remark, that if Mr. *Whitehill* was certain of obtaining them in a short time, I would insert it in the deed that they were obtained. It was agreed by them both that I should. Mr. *Christine* then remarked, he must have a warranty title."

The deed which had been given in evidence contained, in the clause which will be hereafter given at length, these words: "And which *James Whitehill* and others, the heirs of the said *John Whitehill*, did, by their deed of release, grant and confirm unto the said *John M. Whitehill*, party hereto, and his heirs and assigns for ever." The plaintiffs objected to this parol evidence, as being directly contrary to, and going to destroy a material part of the deed. The court admitted the evidence, on the ground it is said, that whatever is stated by the parties at the time of execution of a deed is evidence, or, perhaps, on the ground of fraud in

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the plaintiffs in now relying on that clause. We have certainly gone further than any other court in the admission of parol evidence. Our reports are full of expressions of regret at this, and we find not a few promises not to go further. In fact, we are now at a period when the most material covenant in a deed would be one that neither party should attempt by parol evidence to vary the written contract. This testimony goes not to add something omitted by mistake, or substract something consistently with the deed, but to destroy the most important part of the instrument. It might as well be permitted to swear away the fee simple and reduce it to a conveyance for life. I have said this, on the supposition that it has the effect intended by him who offered it; but, as there was an exception to the opinion of the court on the effect of it, I shall consider that with the other point. *Christine* only said Mr. *Whitehill* was sufficient to him—he must have a warranty; and he said this, when speaking of what title existed in *Whitehill* at the time. He did not suggest the mode of warranty, nor the manner in which the scrivener should bind *Whitehill*; that was left to the scrivener. The mode proposed did bind Mr. *Whitehill*; and, if he objected to the mode, he ought to have said so, and the scrivener would have adopted some other. *Whitehill* agreed to, and signed it.

Most clearly a material part of any deed or writing cannot be contradicted nor explained away by parol, even in *Pennsylvania*, unless in cases of fraudulent insertion of it, or mistake. This case proves no fraud nor *no mistake in Christine*; he must have Mr. *Whitehill* bound, a warranty. *Whitehill* agreed to be bound—strike out this, and he is not bound: there is no warranty of title in him. The precise point came before the Supreme Court of *Massachusetts*, in the case of *Townsend v. Weld*, 8 *Mass. Rep.* 146. The evidence was rejected at the trial, and the court say this is an attempt to control the effect of a written and sealed instrument by parol evidence, which cannot be permitted. Supposing the incumbrance known, it was still competent to the defendant to covenant with his grantee to save him harmless from its effects; and, if such was not his intention, he should have excepted it. There was error then in admitting this testimony. If the plaintiffs had brought an action for deceit, in making a false assertion, this evidence might be admissible, but to relieve the defendant from his deed it was not evidence.

The next was an offer to prove, by *Smith*, what *Christine* told him; viz. that *Whitehill* had not the releases when the deed was given, but was to get them soon, and that Mr. *Whitehill* was good enough to him for them. I repeat, if the object of the suit were to affect *Whitehill* barely for a fraud in inserting a falsehood in his deed, this might be evidence. It is true, what a party to a suit says, is generally evidence against him; but, where a deed is produced in court as the ground of an action, it never can be destroyed

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by any declaration of the holder of the deed, as to what is or is not in it. Such evidence might destroy the effect of any deed; but even this evidence did not tend to destroy the effect of this clause; it went to show that Mr. *Whitehill* was bound to *Christine*, and that *Christine* relied on that.

The plaintiffs offered to show that they had sold the property, by article of agreement, and the purchaser refused to complete the purchase on discovering this defect in the title. The court rejected this, and rightly. This suit was instituted for the purpose of recovering the whole purchase money and interest, on account of defect of title. If it had been for damages, because *Whitehill* had delayed to complete the title under the clause for further assurances, perhaps this evidence might have been given. The defendant held, and had only produced, after proof of notice to produce it, and proof that such a deed existed, a conveyance dated the 19th of *July*, 1822, from the proprietaries of *Springettsbury* manor to himself and *Jacob Strickler* for lands, including that which he had before sold to the plaintiffs. The plaintiffs, in one of their breaches of covenant, had stated an older and better title in *John* and *Richard Penn*. When the defendant produced the deed above-mentioned, it was read by the plaintiffs without any objection; and by this deed it appeared that at the time *Whitehill* sold to the plaintiffs, the title was in *John* and *William Penn*, and since the institution of this suit, had become vested in *John M. Whitehill*, the defendant, and *Jacob Strickler*. After the testimony was closed, the defendant's counsel made the point before the court that the plaintiffs could not recover on this breach, as the evidence did not correspond with the narr, or support it. The plaintiffs then moved to amend, by inserting *William* instead of *Richard Penn*. The defendant objected, and the court refused to permit the amendment, because the testimony was closed. The words of the act of assembly, the act of the 21st of *March*, 1806, section sixth, are, "The plaintiff may amend his declaration or statement, and the defendant may alter his plea or defence, on or before the trial of the cause." Now, if after testimony closed, and argument commenced, the defendant should offer to alter his plea so as to introduce new evidence, and this after the plaintiff's witnesses were dismissed, a court would be right in rejecting it; but the evidence had been received, and received without objection. I would not suspect the defendant's counsel in this case, but it has happened that counsel have admitted evidence clearly objectionable on the present state of pleadings in a cause, and aware that it was so, with the intent to object in a later stage. If the objection had been made when this testimony was offered, clearly the plaintiffs might have amended, it was a clerical error. In this case the amendment ought to have been permitted.

I now come to the main point in the cause. The deed stated that "The said *John M. Whitehill* and wife, in consideration of

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one thousand two hundred dollars, to them paid, granted, bargained and sold, aliened, infeoffed, released, and confirmed, and do grant, &c. (repeating the same words) to *George Christine* and *Andrew Gotwalt*, and to their heirs and assigns, all the following described tract of land, (describing it by courses and distances) containing ten acres neat measure, being part of fifty-eight acres and one hundred perches of land, late the property of *John Whitehill* of *Donegal* township, deceased, which was decreed by an Orphans' Court of *York* county, aforesaid, held the 15th of *September*, 1812, unto the said *John M. Whitehill*, party hereto, one of the sons of *John Whitehill*, deceased, and which *James Whitehill* and others, the heirs of the said *John Whitehill*, deceased, did, by their deed of release, grant and confirm to the said *John M. Whitehill*, and to his heirs and assigns for ever."

The deed contained also a clause of general warranty against all persons claiming the same.

The judge, after stating distinctly that neither *John Whitehill*, the father, nor *John M. Whitehill*, the son, had any title to the lands conveyed, was of opinion that this deed did not contain any agreement or covenant that *John Whitehill*, deceased, was seised in fee, which descended to the defendant and his brothers and sisters, and which was decreed to him in fee by the Orphans' Court in *York* county, and was released and confirmed by his brothers and sisters in fee. He says all that is stated, but not in such terms as to amount to a covenant on which an action can be sustained. He says, further, admitting the truth of the allegations in the first count, they would not form the subject of an action of covenant, but might probably be a good ground for an action on the case for deceit.

A wide range has been taken in the discussion of this cause and the operation of the words grant, bargain, and sell, by the act of 1715, has been discussed. I shall not at this time notice that act further than to say, that although it was not supposed to have exactly the meaning now given to it for near a century after its enactment, yet I am disposed to assent to that construction. A judicial construction which has not been questioned for twenty years, ought to be left untouched by the judiciary. To alter it now by a decision would have all the bad effects of a retrospective law, and would leave the matter liable to be again altered by subsequent judges. I am not sure, however, that the defendant would not be liable on this deed, and the facts in the cause, under any construction which has been given to that law.

The operation of the words *grant*, and *infeoff*, has also been agitated, and it has been supposed the case in 2 *Caines*, 188, and *Co. Litt.* and the cases there cited prove that neither, nor both of those words, ever imported a warranty. Without going into that question, I would surmise, that *Littleton*, in the place there quoted, was speaking of the old warranty—*warrantia chartæ*, which was

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essentially different from the modern covenant of warranty, and that perhaps it will be found that Lord COKE, in all the places there cited, was treating of the same species of warranty, and which is now out of use in *England*. The effect of those words, as importing warranty, and giving the action of covenant, Lord COKE, I think, has no where discussed. The learned judge, in that case, says he has found nothing to contradict the opinion he there gave, except a *dictum* of Lord ELDON, in *Browning v. Wright*, 2 Bos. & Pull. 21: it is not a *dictum*, but the foundation of the whole decision. BULLER, Justice, in the same case, says expressly, the words grant and infeoff, amount to a general warranty in law, and have the same force and effect. And it has always appeared to me, that the covenants of special warranty, as they are called, have no meaning, unless inserted after, and to restrain a general warranty express or implied. I can understand why, if I have inserted in my deed an assertion of title in fee, I should add a clause, that I did not mean to warrant that title, except against my own acts. But where I have not stated or alleged a seisin in fee in myself, either directly or by words of that import, a covenant that I will only warrant my seisin in fee against my own acts, is to my mind, mere unmeaning jargon. Judge KENT might, with a small part of his usual industry, have found the opinion of ELDON and BULLER was the opinion of many other and great judges. In *Man v. Ward*, 2 Atk. 228, there is an express decision of Lord HARDWICKE, that the words grant and convey are a warranty. The opinion of these three, (all great judges,) I oppose to the *New York* case, and so leave this point as not yet quite settled in my mind.

A covenant does not require any express words—neither the word agree nor the word covenant, nor any other set word or phrase is necessary to constitute a covenant. It may as well relate to things past and done as to things future and to be done, and any words which show that the party asserted that a matter material to the contract had been done, amount in a deed to a covenant that it has been done. *Shepherd's Touchstone, Covenant*, p. 160, 161, 162. *Com. Dig. Covenant*, a. 2, *passim*. *Com. Dig. Covenant*, p. 268. If a lease for the lives of A., B., and C. is assigned with a covenant that he has a good estate during the lives of A., B., and C., and they are yet alive, though he does not say and that they are yet alive, yet the assertion is a distinct covenant, of which it will be a breach, if any of them be dead. I consider the clause above cited as an assertion by John M. Whitehill, that he was seised in fee, which came to him in the manner stated. It is contended that it is mere description of the land, or merely a recital; but the county, township, corners and courses, and distances, are the description of the land, and the clause "from part of," &c., to the end, if descriptive at all, are a description of the title. But a false description may avoid the deed, and give covenant against

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the grantor; it may be descriptive, and an assertion of title also. A recital may and often does import a warranty. *Pow. on Contracts*, 143. 1 *Leon*. 122. *Severn v. Clerke*, there cited is in point. The objection was taken that it commenced "whereas," &c. but it was held it was an agreement—for every thing contained in a deed was an agreement: as if a man recited by his deed that he was possessed of a certain interest in certain land, and transferred that interest; if he were not possessed of such interest the covenant would be broken. The same point is directly decided, *Johnston v. Proctor, Yelverton*, 175, where the grantor recited that he was entitled to the whole of the property, when in fact he had title to only one half, and warranted for quiet enjoyment, notwithstanding any act done by him: the grantee was evicted of a moiety, and brought covenant; and the court held the recital was a warranty; and these cases have never been questioned in *England*, and are at this day good law. And they ought never to be questioned any where; they accord with the universal principle that the statement of fact, material in the contract, and which is not true, avoids the contract, and gives action to the party injured; and if the false assertion is in a deed, covenant is the action. *John M. Whitehill* stated in his deed that a title in fee simple for the land he was conveying, was vested in him. This assertion must have been the inducement to the purchase—it brought to *Whitehill* twelve hundred dollars. It is in law, and in common sense and justice, to be taken as an engagement by deed that he had an estate in fee, and he shall not escape by calling it by this or that technical name; for call it what he will, if it is a statement of a material fact, and was not true, he is liable to an action of covenant, and the plaintiff may recover on it. Much has been said on the construction of covenants. The only rule in our times is to give them that construction meant by the parties, and not to render any part inoperative, unless where they are directly contradictory. It is said the covenant of general warranty against all persons, absorbs and extinguishes the implied covenant from the recital or assertion. I believe no authority can be found for this. An express limited covenant on the same matter may restrain a previous implied general covenant, for *expressum facit cessare tacitum*. This, however, only happens where they apply to the same matter; but an express general covenant on the same subject does not extinguish an implied covenant of the same subject, and the party may sue on the one or the other; but in this case the implied and the express covenants are not the same, do not relate to the same matter, and one may be broken (the implied covenant of title) the moment the deed was executed, and the other not until the party is ousted; they are no way inconsistent, and may both well stand and have effect. 4 *Co.* 81. *Noke's case. Shepherd's Touchstone, Covenant*, 165. *Com. Dig. Covenant, D. 4.*

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GIBSON, C. J.—I regret that in some respects I am compelled to dissent from the opinion just delivered. A recital may, undoubtedly, amount to a covenant, although that is by no means a necessary consequence. Mr. *Powell*, in a note to his edition of *Wood's Conveyancing*, (202) takes a distinction between the recital of a *fact*, and the recital of a *deed*; the former being the foundation of an action of covenant, or a decree of specific performance, and the latter, when untrue, being void, as a reference to nothing; and the cases which he cites bear him out. The foundation of the distinction, I take to be the intention of the parties, the recital being an agreement or not, just as the grantor may be supposed to affirm the existence of a fact, and pledge himself for the truth of it. Accordingly, a recital which is only matter of *description*, does not, under any circumstances, become a covenant, as where the *quantity* of the land is mentioned, in addition to the boundaries. *Powel v. Clark*, (5 *Mass. R.* 355.) What is the nature of the recital in the case before us? The defendant conveys to the plaintiff and another since dead, “the following described piece or parcel of land, situate, and being in *Hellam* township, *York* county, bounded and limited as follows: Beginning at a *rock* at the *Susquehannah*, thence south, and to the place of beginning, containing ten acres neat measure.” Now this, without more, would have been altogether vague and uncertain; the name of the township and county, and the indefinite object mentioned as the place of beginning, having ascertained nothing. But when the tract is further described, as part of 58 acres late the property of *John Whitehill* which were decreed to him by the Orphans’ Court of *York* county, and which *James Whitehill* and others, the heirs of *John*, by their deed of release, had confirmed to the defendant, the tract may be identified with certainty. Then the matter comes to this: Did the defendant use these terms to define the subject of the grant, or to assert that he was seised of an indefeasible estate in fee simple? Of his actual meaning I cannot bring myself to doubt. Under any natural or reasonable construction the words do not import an assertion, and the necessary conclusion of fact can be reached, if at all, only by inference and a chain of consequences, as a foundation for a further inference by implication of law, which I submit is much too remote. In transactions of this sort, such a construction would defeat the intention of the parties in ninety-nine cases in a hundred, and in so many cases would the grantor find himself implicated in covenants to which he never dreamt of becoming a party. There is so much practical good sense—so much that comes home to every man’s business and bosom—in the opinion of *LIVINGSTON, J.*, in *Frost v. Raymond*, (2 *Caines’ Rep.* 196,) that I cannot resist a desire to extract the following passage from it: “Nor is there,” says he, “any thing hard or inequitable in denying to the word grant, and to all the others here used, a sense

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which *ex vi termini* no one of them imports, and which it is a hundred to one, was not contemplated by either party. In conveyances of real estate, there must always be danger in implying any thing that is not stipulated in clear and precise terms. This is the safest way of determining the extent of the grantor's responsibility. Whether he is to defend the property against particular incumbrances, or against those who claim under him, or against all the world, ought not to depend on the equivocal or ambiguous meaning of terms used in the granting clause, but on plain and express covenants, which are now therefore uniformly inserted, where it is intended to render the grantor or his heirs liable, in case of eviction or defect of title."

But, were all this otherwise, still, where the parties have particularly designated what they understood to be the extent of their liability, the law will not by implication carry it further. And this rests not merely on its own intrinsic and unquestionable good sense, but also on unquestionable authority. Mr. *Butler* gives it (*Co. Lit.* 384, *a. note*, 332,) as the result of the *English* decisions; and *Cruise*, (*Dig. Tit. Deed, ch. v. sect. 11.*) says an express covenant will qualify the generality of an implied covenant, *so that it shall not extend further than the express covenant*; and for this he cites *Noke's Case*, 4 *Rep.* 80, *b.*, 1 *Mod.* 113, and 1 *Ves.* 101; and these again are fortified by the decisions of the *Supreme Court of New York*. It is true, that in *Noke's Case*, Lord COKE remarks, that an implied and express warranty may exist together, *if both be general*. Undoubtedly they may, and so may any other covenants, which are generically, and specifically the same, and which, consequently, produce the same measure of responsibility. But, where the parties insert a covenant of special warranty, the law will not imply a general warranty, because the latter is inconsistent with the former, and would carry the liability of the grantor further than the point of limitation affixed to it by the parties themselves. This is all that is meant by the *dictum* in *Gales v. Caldwell*, (7 *Mass.* 68,) that there *may* be implied covenants, where they are not inconsistent with those in the deed: in other words, that they may stand together when they mean exactly the same thing. But it may safely be affirmed, that no case can be found, in which a covenant has been implied that created a new responsibility, or increased an existing one; as must necessarily happen here, by implying a covenant of seisin, where the grantee has only thought proper to stipulate for a general warranty. In *Noke's Case*, the implied covenant was different from the express covenant in degree, being larger, and here it is different in kind; but there is the same discrepancy in each, and the same room for the covenantor to say, *non in hæc federa veni*. I am of opinion, therefore, that the plaintiff could maintain an action on this deed only for a breach of the warranty; but I concur on all the other points.

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DUNCAN, J.—On the construction of the conveyance as to the effect of the recital by the grantor of his title, in which the Chief Justice, and my brother HUSRON disagree, I agree to the construction of the latter. This is not a matter of description of the quantity of the estate, as to its boundaries, but of the quality and nature of the title—a description of the title by which he held it, and is a covenant that he held that title, and is not controlled by the covenant of general warranty.

ROGERS, J., did not sit during the argument, and gave no opinion.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, NOVEMBER 15, 1827.]

JOHNSON *against* RAMSEY and another, Executors of
RAMSEY.

IN ERROR.

In a feigned issue between two judgment creditors, to try their right to the proceeds of a sheriff's sale, the one may show by parol evidence that the judgment of the other was satisfied by an execution issued, and levy and payment of money to him, though the execution was not returned. The constable by whom the execution was served, is a witness to prove these facts.

ERROR to the Court of Common Pleas of *Lancaster* county.

Feigned issue to try the right to a sum of money lodged in court. The sheriff had sold the land of *William Brown*. After satisfying previous liens, there remained a balance of the money produced by the sale, applicable to the next judgment; which balance was claimed by *Johnson*, also by *Ramsey*, the parties in the issue. Each had a judgment against *Brown*, but *Ramsey's* was the elder. *Johnson* alleged that *Ramsey's* judgment had been satisfied. It appeared that the justice, from whose docket the transcript of *Ramsey's* judgment had been sent, issued an execution directed to *Jacob Stoner*, a constable. There was no return of this execution. *Johnson*, on the trial, produced the execution, and offered *Stoner*, as a witness, to prove that he, while constable, had, on that execution, seized the goods of *Brown*, and sold them at a public sale for more than enough to satisfy the judgment, and that he had paid over the debt and interest to the justice. The evidence was rejected, and a bill of exceptions taken by *Johnson*.

The cause was now argued by *G. W. Jacobs*, for the plaintiff in error; who cited, 2 *Bac. Ab. Title Execution*, 721. 4 *Johns.*

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Ch. 229. *Pennsylvania Practice*, 305. 12 *Johns. Rep.* 207. *Purd. Dig.* 455. sect. 12. *Norris's Peake*, 209. 10 *Johns. Rep.* 21. 1 *Ph. Ev.* 39. 5 *Johns. Rep.* 256. 4 *Johns. Ch.* 228.

And, by *Buchanan*, for the defendant in error; who, in his argument cited, *Purd. Dig.* 454; the clause for *scire facias* against a constable, and 4 *Day*, 462.

The opinion of the court was delivered by

TOD J.—To the testimony offered to be given by *Jacob Stoner*, two objections appear to have been made in the court below. The same objections have been relied upon in the argument here. 1st, That the evidence was in itself illegal, being by parol only. 2d. That admitting the evidence to be legal, *Stoner*, the witness, was incompetent to give it, being interested in the case, and being himself the officer who ought to put his return upon the record.

1st, It would seem to me, that the question to be decided in this case, was precisely the question which would have been presented, had the contest been between *Ramsey* and *Brown*: that is, had *Ramsey* by action of debt or *scire facias* demanded the money appearing to be due on the face of his judgment, and *Brown* had answered, "You took your execution on this same judgment, and upon it the constable sold my goods for money enough to pay the debt and costs;" offering parol proof of these allegations. It does not occur to me, what better proof he could be expected to offer. The reason appears stronger for receiving this sort of proof from *Johnson*, than from *Brown*. By no care of his could *Johnson* provide clearer evidence, having no pretence of right to intermeddle in the suit, and to call for the return of an execution to which he was a stranger. The authorities cited by the counsel for the plaintiff in error, seem to me conclusive. It was neither for *Brown* nor for *Johnson* to see that the constable did his duty by paying over the money or making a return. Seizure of goods sufficient to pay the debt and costs, though without sale, and though wasted immediately by the officer, is a satisfaction of a judgment. By the old law, an *audita querela* lies if a man pay a judgment, and afterwards be taken in execution, *though he has no writing for the payment*. 1 *Com. Dig. Audita Querela*, Letter A. Parol evidence was admitted to prove a levy upon a *fi. fa.* though no return had been made upon it. 1 *Munf.* 269, and see *Com. Dig. Pleader*, 2 *W.* 36. Indeed, the directing the issue by the court below, to ascertain whether the judgment was paid or not, seems to show that *some* parol proof might be material: for, if the record only was to be looked to, the court would have settled the contest at once by inspection. 2d. Was *Jacob Stoner*, the witness offered, incompetent from interest, or otherwise? I think not. Most clearly he was interested against the side that called him. His admission of the sale of the goods, and of raising the money,

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is conclusive against him: adding that he paid over the debt and interest to the justice, is by no means conclusive in his favour. Stoner's credibility was a question for the jury.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, NOVEMBER 15, 1827.]

FRANKLIN, for the use of GROSS and Wife, *against*
MACKEY.

IN ERROR.

A plaintiff may, after amending his declaration twice, amend it a third time on trial, the act of assembly not fixing any limit to the number of amendments. It is no objection to amending the narr, in debt on a recognizance, (so as to make it a several recognizance,) that the writ has described the defendant as a joint and several recognizor.

A plaintiff who is prevented by mistake from giving any evidence to the jury, is not prohibited by the act of assembly from the right to enter a nonsuit.

ERROR to the Court of Common Pleas of *Lancaster* county. The plaintiff in error was plaintiff below.

Debt on recognizance in the name of WALTER FRANKLIN, presiding Judge of the Orphans' Court of *Lancaster* county, for the use of *Adam Gross* and *Elizabeth* his wife, in right of said *Elizabeth*, against *James Mackey*, joint and several recognizor with *Adam Gross* and *George Shockey*, with notice to *Robert M. Ross*, purchaser and terre-tenant. Pleas *nil debet* and *payment*. On the trial the record of the recognizance, variant in sundry particulars from the declaration and from the writ, was offered in evidence by the plaintiff, opposed by the defendant, and rejected by the court. The plaintiff tendered a bill of exceptions. Two successive amendments in the declaration, particularly specified, were then asked for by the plaintiff's counsel, and permitted by the court. The record of the recognizance was again offered in evidence, opposed by the defendant's counsel, and again overruled by the court. The plaintiff's counsel tendered another bill of exceptions to this opinion, and then asked leave further to amend the declaration by inserting the word "each" after "themselves," and the words "*Adam Gross*" after "*Mackey*." The object of this amendment was to make the declaration agree with the recognizance, which, as appeared by the record, was several and not joint. This third amendment was denied by the court for two reasons: 1st. As not being such an amendment as the act of assembly contemplates. 2nd. As being an amendment proposed after two amendments had been allowed subsequently to the jury being sworn.

(Franklin, for the use of Gross and Wife, v. Mackey.)

Whereupon the plaintiff's counsel took a third exception, and then submitted to the court the following motion: "The court having rejected the two last amendments offered by the plaintiff's counsel, and also having rejected the evidence offered, the plaintiff now asks the court's permission to take a nonsuit, which said motion was opposed by defendant's counsel, and on argument, the court sustain the objection, and disallow the motion." Bill of exceptions by plaintiff thereupon.

The cause was argued, in this court, by *Wright* and *Buchanan* for the plaintiff in error, who cited, *Norris's Peake*, 289. *Phil. Ev.* 163. 8 *Johns. Rep.* 26. *Purd. Dig.* 421. *Act of 1814.* 3 *Binn.* 557.

And by *Champneys* and *Porter*, for the defendant in error, who cited the *Act of Assembly of the 19th of April, 1794, sect. 22, Purd. Dig.* 378, 379. *Act of Assembly of 1806, Purd. Dig.* 411. *Grasser v. Eckert*, 1 *Binn.* 575. *Cunningham v. Day*, 2 *Serg. & Rawle*, 1. *Cassin v. Cooke*, 8 *Serg. & Rawle*, 9. 11 *Serg. & Rawle*, 98. 1 *Chitty Pl.* 304. *Starkie Ev.* 154, 155, 157. *Purd. Dig.* 20. *Act of the 28th of March, 1814, sect. 2. Purd. Dig.* 24. *King v. Sloan*, 1 *Serg. & Rawle*, 77. *Moore v. Hamilton*, 11 *Serg. & Rawle*, 146. 2 *Binn.* 234.

The opinion of the court was delivered by

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 TOP, J.—All the assignments of error have been abandoned except two, the denial of the amendment last offered, and, 2d. the denial of the nonsuit. The amendment depends entirely upon the act of assembly of the 21st of *March, 1826, (Purdon, 411.)* It appears to be the intent of the act to allow amendments on the trial, without any stint as to number. This seems to be conceded by the counsel for the defendant in error; but they argue that the amendment here proposed was such in itself, as is not permitted by the act; because it in a matter of substance, contradicts the writ, changes the contract, and brings in a new cause of action. They rely upon *Grasser v. Eckert*, (1 *Binn.* 575.) *Cunningham v. Day*, (2 *Serg. & Rawle*, 1,) and other authorities. They also insist upon the plain words of the act of assembly; and say that the word, "informality," is the only term used in the law describing what may be amended on the trial.

It is so. "Informality," is the word in the law: yet, it appears to me, that were we to hold matters of mere form only to be amendable after the jury sworn, we should go far towards declaring this part of the act useless. Matters of mere form in the record, are not often inquired into before the jury. Besides, the very next words of the act seem to show the meaning of the legislature; for it must be absolutely impossible for the adverse party to be taken by surprise by an amendment which does not touch the merits or substance of a cause. *Grasser v. Eckert*, and *Cunningham v. Day*, only show, that an action substantially defec-

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tive and vitious in its commencement, shall not be made good; nor shall a new cause of action be introduced by amendments. Here the objection is, that the writ named *James Mackey* as joint and several recognizor, &c.; and the amendment of the declaration proposed to describe the recognizance as several only. Now it appears to me, that the words of description, added to the name of *James Mackey* in the writ, are of no substance, but are rather surplusage. I do not say that, in my opinion, the amendment was necessary. Perhaps, the terms of the writ were not in any possible way inquirable into before the jury. But, waving that point, it seems to be decided in numerous cases that words of description, attached to a name in a writ, are of very small consequence. *Wilson v. Wilson*, (3 Binn. 557,) was the case of a writ, naming the defendant as executor of another: yet, a declaration, and a recovery against him in his own right. In *Gratz v. Simons' Executors*, (1 Binn. 588,) the plaintiff was allowed to amend by filing a count describing the plaintiff himself, and the right in which he sued, different from the description in the writ. *Jennings v. Cox*, (1 Binn. 588.) *McKee v. Thompson*, (*Addison*, 24.) *Crotzer v. Russell*, (9 *Serg. & Rawle*, 78.) Clear it is, from these authorities, that the plaintiff was not precluded, by the words of the writ, from the amendment he asked for. In rejecting it, I think there was error.

The remaining point is the denial of the nonsuit. I take it to be clear, that by the common law, and until the act of assembly of the 28th of *March*, 1814, (*Purd. Dig.* 421,) the plaintiff always, except in some few cases for peculiar reasons, might elect to take a nonsuit, when the jury appeared at the bar ready to give their verdict, or at any time before. The words of the act are these: "Whenever, on the trial of any cause, the jury shall be ready to give in their verdict, the plaintiff shall not be called, nor shall he then be permitted to suffer a nonsuit." I do not understand these words as taking from a plaintiff the right of withdrawing his action, by a nonsuit, when by occasion of a manifest mistake of himself or his attorney, he is prohibited from giving any evidence whatsoever to the jury. We cannot reject the word "then" from this law. One object of these acts of assembly appears generally to have been, to prevent an error in practice from being fatal to the justice of a cause. We should not be going back to the severity of the old law, but going far beyond it, were we to hold that a plaintiff who gives no evidence whatsoever, on account of a mistake in presenting his case, shall be debarred from a nonsuit, and from a new action on payment of the costs of the first suit.

Another act of assembly, passed the 28th of *March*, 1820, (*Purd. Dig.* 24,) has been relied on. It forbids any party entering an appeal, to withdraw the same without the consent of the adverse party. The act seems not to apply to this case. Here there had indeed been an award of arbitrators. but the award was in favour of

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the plaintiff, and the defendant was the appellant. The act does not withhold a plaintiff who gains his cause before the arbitrators, and who does not appeal, from giving up the award and his cause together. With respect to an argument drawn from the provision of the arbitration law, that the award shall stand as a judgment until reversed on appeal, I would observe, that the award in this case does appear to be reversed, to all intents and purposes, by the nonsuit. I am opinion that the judgment should be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER NOVEMBER, 15, 1827.]

MARTIN and another *against* KAFFROTH.

IN ERROR.

A party has a right to take a second deposition of the same witness, without leave of the court or cause shown. But the court can prevent the abuse of such right.

Where in an action on a bond, against A. and B., evidence was given tending to show that the bond was given to indemnify the plaintiff against liability as the indorser of a note discounted for the benefit of A., B., and C., against whom a judgment was confessed by A. and B. in the name of the firm, *held*, that the record of such judgment is competent evidence for the defendants, without having previously proved a partnership between A. B. and C.

And a paper not under seal, purporting to be a release of such judgment, may be given in evidence to the jury, under the plea of payment, with leave, &c. The declarations of a partner, not a party to the suit, are not competent evidence of a partnership.

ON the return of a writ of error from the court of Common Pleas of *Lancaster* county, accompanied by five bills of exceptions to evidence, it appeared, that on the 26th of *April*, 1821, judgment was entered in the court below in favour of *Jacob Kaffroth*, the defendant in error, against *Jacob Martin* and *George Kuss*, the plaintiffs in error, by virtue of a warrant of attorney, accompanying a bond dated the 18th of *March*, 1807, conditioned for the payment of three hundred and seventy-five pounds by the latter to the former, on the 20th of *May*, 1807.

On motion this judgment was opened by the court, and the defendant let into a defence; whereupon they pleaded payment with leave, &c., and a release, to which the plaintiffs replied no release, and no release in this suit.

First Bill of Exceptions.—After the plaintiff had gone through his case, the defendants offered in evidence the deposition of *Charles Smith*, esq., taken on the 8th of *January*, 1825, which had been filed in the prothonotary's office, previous to the trial. It appeared that the deposition of Mr. *Smith* had been previously taken on a

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five days' rule, on the 19th of *March*, 1822, and read in evidence on the motion to open the judgment; and further, that on the 15th of *December*, 1824, a rule for a commission to *Baltimore*, for the examination of Mr. *Smith*, was entered, and notice given to the plaintiff's attorney, but nothing further was done towards prosecuting the commission. On these grounds, the plaintiff's counsel objected to the admission of the deposition, and the court rejected it, upon which an exception was taken to their opinion.

Second Bill of Exceptions.—The deposition of Mr. *Smith*, taken on the 19th of *March*, 1822, as mentioned in the preceding bill, was then offered on the part of the defendants, and objected to on the part of the plaintiff because it had not been filed, and marked filed, agreeably to an existing rule of court. The objection was sustained by the court, and another bill of exceptions tendered and sealed.

Third Bill of Exceptions.—It was proved by the defendants that several executions were at the same time, and by the same attorney, placed in the hands of the sheriff of *Lancaster* county, all returnable to *April* Term, 1808. In one of these executions *Jacob Kaffroth* was plaintiff. The defendants were *Martin* and *Keiss*. The sheriff went to the store of the defendants and made a levy. *Kaffroth* afterwards went to the sheriff's office in company with *John Gundaker*, the plaintiff in one of the executions, together with the plaintiffs in the other executions, and wished him to deliver the goods levied upon, into the hands of *Gundaker*. *Kaffroth* did not say that he had any other claim than that for which execution had issued, though he knew that the sheriff had levied on all the effects of the firm of *Martin*, *Keiss*, and Co. The money arising from the sale of the property in the hands of *Gundaker*, was distributed on the 5th of *September*, 1818, among these judgment creditors, by *Charles Smith* and *George B. Porter*, esq., and *Kaffroth* received his proportion.

About the middle of *March*, 1807, *Jacob Kaffroth* showed to a witness a judgment bond signed by *Martin* and *Keiss*, and some years afterwards he stated to the same witness that he had another bond from the same person, entered and recorded in the register's office. On being asked the reason, he replied that he thought the last better than the first. He stated that he had been an indorser in the bank at *Lancaster*, for one thousand dollars, and both these bonds were given to secure this indorsement. Sometime afterwards he told the witness that *Martin* and *Keiss* had failed; that their goods were taken by the sheriff, and afterwards sold by consent at auction, when he drew a proportion with the rest of the indorsers, and that *Keiss* had gone to *Philadelphia*, and compounded with the merchants, and that he and the other indorsers had considered that if he could compromise with the merchants, they would give him a release, which they had done and signed. He stated to *Keiss*, in the presence of the witness, that although

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he was dissatisfied with *Martin*, he was perfectly satisfied with him, and would not look to him any more.

After the facts above stated had been proved, the defendants offered in evidence the certificate of the cashier of the branch bank, showing that *Martin* and *Keiss's* note for one thousand dollars, indorsed by *Jacob Kaffroth*, had been discounted in that bank on the 12th of *February*, 1806, and renewed from time to time until the 1st of *June*, 1808, when it was protested; and that on the following day it was paid by *Jacob Kaffroth*. This evidence was objected to, not because it was offered in the shape of a certificate, but because it was upon other grounds incompetent. It was, however, rejected by the court, to whose opinion an exception was taken.

The defendants then offered in evidence a copy of a record of a judgment for twelve hundred dollars, entered in the Court of Common Pleas of *Lancaster* county, on the 27th of *April*, 1808, in an amicable action of debt, in which *Jacob Kaffroth* was plaintiff, and *Jacob Martin*, *George Keiss*, and *John Morris*, co-partners in trade, were defendants. They at the same time offered copies of judgments entered in the several amicable actions in the same court, the same day, against the same defendants. They at the same time offered copies of judgments for different amounts, entered in several amicable actions of debt on the same day, in the same court against the same defendants, in which *John Gundaker*, *Adam Reigart*, *Christopher Brenner*, and *Abraham Brenner*, were respectively plaintiffs. The confession of judgment in all these cases was signed by *Jacob Martin* and *George Keiss*, "For *Martin*, *Keiss*, and *Morris*." The evidence being objected to by the plaintiff's counsel, was rejected by the court, who sealed another bill of exceptions.

Fourth Bill of Exceptions. The defendants then offered to prove declarations and acknowledgments by *John Morris*, that he was a partner of the firm of *Martin*, *Morris*, and Co.; that *Morris* sent to *Philadelphia*, and opened and kept store there, and that the other two partners, at the same time, kept store in *Lancaster*. In connexion with this offer, they again offered a copy of the judgments mentioned in the preceding bill of exceptions. The court rejected the evidence, and exception was again taken.

Fifth Bill of Exceptions.—Finally, the defendants offered in evidence the following instrument, the rejection of which by the court formed the subject of the last bill of exceptions:

"Whereas we the subscribers have heretofore obtained judgments against *Martin* and *Keiss*, which are entered on the docket of the Court of Common Pleas in and for the county of *Lancaster*, and executions have issued thereon respectively, and certain store goods levied by the sheriff, and the book debts assigned towards satisfaction thereof, all of which is to be apportioned among the said judgment creditors, but there is no reasonable expectation

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that the whole of the said judgments will be satisfied, but only part thereof in proportion; nevertheless, being desirous to discharge *George Keiss* from any future responsibility on, or on account of said judgments, so that his future effects shall not be liable to be seized or affected thereby, we do agree, that on payment of the costs on the said judgments in the prothonotary's office, we will, and we do, hereby release the said *George Keiss* from any future responsibility on the said judgments, or any or either of them, and discharge him any future liability by reason thereof. This agreement, however, is in no wise to affect the said judgments, or any of them, so far as regards any past or former proceedings, or to discharge the said executions, or other matters assigned towards payment of said judgments, but on receipt of our respective dividends of the goods levied and sold, or the proceeds thereof, and the proceeds of the book debts, we will enter satisfaction in full for said judgments which are kept on foot solely for completing the proceedings already had therein."

Lancaster, April 15th, 1812.

*John Gundaker,
A. Breneman,
Christopher Brenner,
Charles Smith, Attorney for Joseph
P. Horner, surviving Benjamin
Horner,
Jacob Kaffroth."*

Jenkins, for the plaintiffs in error.

1. The deposition of Judge SMITH was competent. Under our practice, a second deposition may be used. *Pennsylvania Pract.* 161. *Whart. Dig.* 493. At all events, it ought to appear, that the first deposition might have been used before the second is excluded. In the present instance the previous deposition was taken for the purpose of opening the judgment; and by the rules of the court below, the terms of the rule for a deposition to be used on an argument, and of one to be used on a trial, are different. In one case, the deposition must be filed; in the other, it need not. In *Forney v. Hallacher*, a deposition taken by consent, and used before arbitrators, was held not competent to be used on the trial of the cause. It is no objection to a deposition, that a party has subsequently taken out a rule for a commission, to examine the witness in another state.

2. The court, by rejecting the deposition first taken, as well as the second, have placed the defendants below on the horns of a dilemma. The last deposition is rejected, because an earlier one is in existence, and that is also rejected, because the rules of court have not been complied with. The only plausible reason for rejecting the second deposition, is, that it was unnecessary to take

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it, when another existed. But if the first cannot be used, it is a nullity, and therefore the reason fails.

3 and 4. After having proved that the consideration of the bond was the indorsement of a note in bank, and that there was no other debt, the defendants had a right to show the judgment upon which execution issued, and money was paid, in order to raise a presumption that the bond on which this suit is brought, was included in that judgment.

5. The paper purporting to be a release, whether it was technically such or not, ought to have been admitted in evidence, because it showed that the plaintiff's claim was to be extinguished by his receipt of his proportion of the proceeds of the goods levied upon, and afterwards sold, upon which he was to enter satisfaction. This proportion he has actually received, and thus the plaintiff has been actually paid.

Porter and Buchanan, for the defendant in error, 1st. The practice of taking depositions is derived from chancery, and is to be governed by the same rules. There, if the first deposition be irregular, it is to be suppressed, and no second deposition can be taken, but on motion and leave granted. 2 *Madd. Ch.* 313. 1 *Ham. Ch.* 356. In *Pennsylvania*, the practice is not to move to suppress a deposition, but to take exception at the trial. A party ought not to be permitted to refuse to file a deposition which does not suit him, and take another, more to his purpose.

3. The judgments offered in evidence were against the defendants as partners in trade, and the arrangement proved was with their creditors, in relation to the partnership debts; and consequently had no relation to the transaction on which the present suit is founded.

4. Declarations of a partner, are not evidence to prove partnership. 10 *Johns.* 66.

5. The paper pleaded as a release also related to another transaction. Besides, it was inadmissible from not being under seal. 11 *Johns.* 513. 14 *Johns.* 404.

Hopkins, in reply, was stopped by the court.

The opinion of the court was delivered by

GIBSON, C. J.—Abuses of the rule to take depositions may undoubtedly occur; and where they appear, it will be proper to correct them. But nothing of the sort appears by the bill of exceptions; the question having been decided on the abstract right of the party to take a second deposition without the leave of the court, or cause shown: a right which I have never before heard doubted. On the contrary, it is notorious that the practice to re-examine as often as occasion may require, is general, if not universal. But were this otherwise, still the prior deposition in this case, was taken on a five day rule, which by the rules of the district, was too short to entitle it to be read at the trial; even though

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a deposition taken for the particular purpose of procuring a judgment to be opened, were competent for every other purpose; a point about which we intimate no opinion. The objection that the defendants had given notice of a commission to examine the witness in *Baltimore*, in case he had not come to a place within the jurisdiction of the court, is too much attenuated for my perception; and, I shall only say, that we cannot sustain the judgment on that ground.

The judgments confessed by *Martin* and *Keiss*, for *Martin*, *Keiss*, and *Morris*, ought undoubtedly to have gone to the jury. It is true, that *Martin* and *Keiss* alone are liable on their bond; but the discount obtained on the credit of *Kaffroth's* indorsement, which was the consideration of it, may have been for the benefit of all three; and, if this were so, it would be not only possible, but highly probable, that the original security was abandoned, and the debt included in the arrangement with their creditors. There was, indeed, no evidence of their having been partners in trade; but the defendants contended they were, and might, perhaps, have subsequently proved it; or, the jury might possibly have inferred it from the circumstances. If this were established, nothing could withstand the inference that the judgment and the bond were separate securities against the eventual liability of the indorser. The defendants had given evidence which, if believed, must irresistibly lead to that conclusion, independently of proof of the partnership, the existence of which is not indispensable; and, that the fact might, by possibility, be as the defendants contended, is sufficient to show that an objection to the evidence could not be urged to the court, but to the jury, who were the constitutional judges of its effect, and who had a right to the entire developement of the transaction with its circumstances. Among these, the paper called a release, was an essential one. This could not be pleaded as a release at law, both because it was unsealed, and it did not purport to be a release of the instrument on which the action is founded: and which, therefore, can be affected by it only in equity, by showing the identity of the debt sued for, and that discharged by releasing the judgment. If there be a perfect identity in this respect, it is plain that a release of the judgment by an instrument operative either at law or in equity, will discharge the debt secured by the bond; at least, as far as actual satisfaction has been made; in which case, it would be unconscionable in the obligee to pursue on the bond. Thus we perceive that the defence was an equitable one, and proper to be urged under our plea of payment, with leave to give the special matter in evidence. Then, as the defendants had pleaded payment in addition to the existence of the release as an instrument, a variance between the instrument produced and that set out in the plea is immaterial, because it might be given in evidence without being pleaded at all. Nor is it ma-

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terial, that it was not sealed, as it amounts to an agreement which would be enforced in equity.

The remaining error is not sustained; it being perfectly clear, that the declarations of a partner, not a party to the suit, are not competent evidence of the partnership.

Judgment reversed, and a *venire facias de novo* awarded.

GIBSON, C. J., delivered the opinion of the court, DUNCAN, J., being sick and absent, and ROGERS, J., being also absent.

[LANCASTER, NOVEMBER, 1827.]

GRACY and another against BAILEE.

IN ERROR.

Where a rule of court directs notice to be served on a party, service on the attorney is not sufficient, though the attorney, on receiving notice, makes no objection.

Where suit is brought for an alleged balance of an account, which the defendant contends is not the true balance, or where the defendant alleges an account of the plaintiff to which originally he did not object, from ignorance or mistake, to be erroneous, and calls for it on the trial, for the purpose of disproving it, the fact of his calling for it, and reading it to the jury, is no evidence of its correctness. The jury are to judge of the effect of the account, taken in connexion with all the other evidence given in the cause, and considering the purpose for which it was called for and read.

A tradesman who moves from one part of the country to another, and there does work, without any agreement as to price, is entitled to the usual price of the place where the work is done, and not that of the neighbourhood from which he removed.

ON the trial of this cause, in the Court of Common Pleas of Lancaster county, the plaintiffs in error, who were also plaintiffs below, offered the depositions of witnesses, taken under a commission to Baltimore: after having proved service of notice of the commission and a copy of the interrogatories, on the defendant's attorney; the counsel for the defendant objected to the testimony, because the notice had not been served on the party, agreeably to a rule of court. The objection was sustained by the court, who sealed a bill of exceptions.

At a subsequent stage of the cause, the plaintiffs again offered in evidence the depositions above mentioned, at the same time offering to prove, in addition to the evidence before given on the subject of notice, that when the notice was served on the defendant's attorney, he received it without making any objection whatever. The court was of opinion that the additional evidence, in relation to notice, might be received; but that if all was proved which was offered on that subject, the depositions taken under the

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commission,) were not admissible in evidence. The plaintiffs' counsel again excepted to the opinion of the court.

At the conclusion of the trial, the counsel for the plaintiffs submitted to the court for their opinion, the following, among other legal propositions. The facts, however, upon which these propositions were founded, did not appear in the paper book.

Proposition. That the plaintiffs' bill read in evidence to the jury by the defendant became evidence for the plaintiffs, and is *prima facie* evidence of its correctness, and in order to destroy its effect, it is incumbent on the defendant to show its incorrectness.

Answer. The plaintiffs also rely on the bill, which was made out by them, and being called for by the defendant, they say it is thereby made evidence for them, as to the items contained in it. But I do not think this position sustainable, or that it is even *prima facie* evidence of its correctness.

Proposition. That where a man employs a mechanic from *Baltimore*, to do work in *Marietta*, the presumption of law is, that the employer shall pay *Baltimore* prices, if they be higher than those at *Marietta*.

Answer, (after stating the proposition.) I cannot so instruct you, because I know of no such presumption.

Buchanan, for the plaintiffs in error.—The words of the rule under which the commission to *Baltimore* was rejected, and which was adopted at *April* Term, 1811, are, that the notice shall be served "on the adverse party." The word party was here used in a peculiar sense, and means the party himself, or his representative, who is his attorney. The rule permits *either party* to enter a rule for a commission, and it will hardly be contended that this may not be done by the attorney. It is a general principle, that notice shall be served on the attorney, and a different one would be attended with great inconvenience, where the party himself resides at a distance. In this case the attorney did not object to the service, which brings it within the decision in *Newlin v. Newlin*, 8 *Serg. & Rawle*, 41. 1 *Browne's R.* 14. The defendant having called for the plaintiffs' bill, and read it to the jury, made it evidence for the plaintiffs by a well established principle. From circumstances, the presumption was, that the *Baltimore* prices were to be charged.

Champneys and *Porter*, for the defendant in error.—Service on the attorney is not good, where there is a rule of court prescribing service on the party. The case in 8 *Serg. & Rawle*, 41, turned on the supposed effect of the sickness of the attorney; and it did not appear that any rule of court required service on the party. The insufficiency of service of notice on the attorney, in a case like the present, was expressly decided in *Nash v. Gilkeson*, 5 *Serg. & Rawle*, 352.

(Gracy and another v. Bailee.)

The opinion of the court was delivered by

HUSTON, J.—The plaintiffs offered in evidence the commission to take the deposition of a witness in *Baltimore*. This was objected to, because notice of the commission and interrogatories was not served agreeably to the rule of court. The proof was that the notice was served on defendant's attorney, who made no objection to receiving it whatever. The rule of court in this county on the subject is a copy of the rule of the Circuit Court of the year 1805, and requires the notice to be served on the adverse party. That rule was well understood—under it a notice on the attorney was not good, and to remedy this the Circuit Court, in 1811, made another rule that the notice might be served on the party or his attorney. The difference between a service on the party, and on his attorney, is well understood; several of the rules of this court express that the notice may be served on the party, and others may be served on the party or his attorney. The same distinction will be found in several of our acts of assembly, particularly in the arbitration act, and its supplements. But it is said there is a decision of this court, 8 *Serg. & Rawle*, 41, that service on an attorney is good unless he objects. I would observe that a notice may be, and often is given to an attorney, when engaged in another matter, and he receives it without knowing at the time what it is. No rule of court is mentioned, or alluded to in 8 *Serg. & Rawle*; of course it decides that in the absence of any rule on the subject, a notice to take depositions, like any other notice in a cause, may be served on the party or his attorney, and be good, especially if the latter on receiving it makes no objection. That this was the meaning of the court, will appear by referring to 5 *Serg. & Rawle*, 352, where it is expressly decided that where the rule of court prescribes notice on the *party*, a notice on the attorney is not good. There was then no error in rejecting this deposition. Where the court who made the rule decide on a printed rule of their own court, we will not readily reverse their decision. And in this case it is a rule adopted from another court, who had put the same construction on it, and made a new rule to get clear of that construction.

Two positions were stated to the court as being law, and the court gave an opinion on each against the plaintiffs, and were right in each case.

When a party calls for the account of his opponent, and on its being produced, reads it to the jury, it may generally be considered as making it to some extent, evidence; but where suit is brought on what is alleged to be the balance of an account, and the defendant alleging that not to be the true balance; or where the defendant alleges that an account of the plaintiff, which he did not originally object to from ignorance or mistake, is erroneous, and calls for it expressly to disprove some of the items, and the amount

(Gracy and another, v. Bailee.)

charged on every one of them, and does give evidence to this effect, it would have been a great error in the court to tell the jury, that the fact of the defendant calling for it, to disprove it, was any evidence of its correctness. The jury are always to judge from the whole evidence. It is now too common to select a part of the testimony, and ask the court to give an opinion on that part alone. It was perfectly immaterial what would have been the effect of this account if read alone. The true question was, what was the effect of it taken in connexion with the other testimony in the cause, and considering the purpose for which it was called and read.

The next point does not arise in the cause. There is no proof that the plaintiffs were induced by the defendant to come from *Baltimore* to *Columbia*. But if there was, a tradesman who moves from one part of the country to another, and there does work without any agreement as to price, is entitled to the usual price of the place where the work is done, and not the price of the neighbourhood from which he removed. This was decided here, and will be found in 12 *Serg. & Rawle*, 409.

Judgment affirmed.

[LANCASTER, NOVEMBER 1827.]

BARCLAY, surviving Executor of BARCLAY, *against* MORRISON, Administrator of ANDERSON.

APPEAL.

If one of two executors, who have separately administered different parts of the testator's estate, dies, his administrator may settle a separate account of the administration of the deceased executor.

Receipt in these words, "Received, 1815, from W. B., on account of taxes and exempt fines, twenty dollars per R. A." and signed by the treasurer: W. B. was a collector of taxes, and lived more than twenty miles from the county town. *Held*, That on the face of this receipt, it ought to be taken that W. B. sent the money by R. A.

Where the books of a deceased tavern-keeper were left with his widow, who was his executrix, *held*, that her co-executor was not chargeable with the book debts uncollected, though the whole amount of those debts was returned without distinction in the inventory; this being no proof that more might have been collected than was accounted for.

APPEAL by *Elizabeth Barclay*, surviving executrix of *William Barclay*, deceased, from the decree of the Orphans' Court of Lancaster county, on the settlement by *Samuel Morrison*, administrator of *Robert Anderson*, who, in his lifetime, was co-executor of *William Barclay*, of the account of the said *Robert Anderson's* administration of the estate of the said *William Barclay*.

(Barclay, surviving Executor of Barclay, v. Morrison, Admr. of Anderson.)

The opinion of the court was delivered by

HUSTON, J.—*William Barclay*, who died in 1816, had, by his will, appointed his widow, *Elizabeth Barclay*, executrix, and *Robert Anderson*, Esq., executor of his last will. They proved the will, and letters testamentary were issued to them jointly.

They returned into the Register's Office an inventory. *William Barclay* had kept a tavern, and the executor very unwisely returned the amount of all the charges found in his tavern books from 1800 up to his death, without distinguishing between the sperate and desperate debts.

After the death of *Robert Anderson*, who died intestate, his administrators filed with the Register an account of his administration, as did the widow of her administration. The two accounts came before the Orphans' Court on the same day. From the account of *Robert Anderson's* administration of such part of the estate as came to his hands, as the same was passed by the Orphans' Court, the widow appealed.

In this court, a preliminary point was made by her counsel; viz. it was insisted that *Elizabeth Barclay*, as surviving executrix, must settle the whole account, as well of what she administered as of what was done by *Anderson*, and that an account could not be received from the representatives of *Anderson*. It was also insisted, that settling an administration account is an act of administration, and that the administrators of an executor were not administrators of the first deceased, and could not do any act respecting his estate. Without disputing about the abstract meaning of words, the administrators of a man who was attorney in fact, and as such collected money, are not attorneys in fact of the principal, and yet they may settle the accounts between the deceased attorney, and his principal. The administrators of a deceased officer of government are not officers of government, and yet they may—nay, they must settle the accounts of the deceased, with the government; and generally must settle every account, whether official, representative, or private, which their deceased left unsettled.

The proceedings, in the several courts of *England*, are so unlike any thing we have here, that it would be misspent time to trace them. It would seem, however, such settlements are not unknown there. *Toller* tells us, page 491, that accounts and payments of sums under forty shillings are generally allowed on the oath of the executor; and adds, after the death of an executor sums under forty shillings are not allowed on the oath of his representatives; for such payments can be substantiated only by him who made them. The representatives of an executor, may then settle his account, though not so advantageously, in all cases, as he might have done while alive.

The administrators of an administrator were cited, and settled

(Barclay, surviving Executor of Barclay, v. Morrison, Admr. of Anderson.) an account with the administrator *de bonis non*, and were sued for the balance found due from their intestate, as administrators. Several exceptions were taken to the recovery; it escaped, however, the counsel and the court, that such account could not be settled in that way, and plaintiff recovered. *Sloan v. Story's Administrators*, 6 Mass. R. 390. And, in our own court, *Haine*, brought suit against the administrator of *Hubert*, for money alleged to be due to the plaintiff from *Hubert*, as guardian of the plaintiff. The administrators offered in evidence, at the trial, an account of his guardianship kept by their intestate in his life, and their own oath. The late Chief Justice says, there would be no pretence for offering these in a Court of Common Pleas; the account not having been exhibited to the Orphans' Court and settled there as it ought to have been. And BRACKENRIDGE, the only other judge in court, says, the only objection to it is, that it had not been offered to, and passed by the Orphans' Court, in the first instance. *Haine v. Hubert's Administrators*.

If the representatives of a deceased executor, may settle his account when he was sole executor, there are many reasons why they should do it, and why they should not permit the vouchers to pass out of their hands to a co-executor, who, of all men living, has the greatest interest to settle it so as to discharge himself, and charge the estate of the deceased executor. An inconvenience, it is said, may arise from admitting one party to settle a separate account. This is no objection, as the court, I believe, never permit it without having the other co-executor before them; and, in general, do not finally pass one account until the other is also brought before them. If the representatives of a deceased executor, choose to give their papers to a surviving executor, and he settles the whole estate, there can be no objection, ordinarily. If they will not give their books, papers, &c., the first section of the act of 1713, clearly gives authority to the Orphans' Court to compel them to settle the account of what was administered by those deceased; "Shall cause to come before them such who, as guardians, tutors, trustees, executors, administrators, or otherwise, are or shall be intrusted with, or *any wise accountable for, any lands, &c.*"

Many exceptions were taken to items of the account, most of which were here abandoned. I shall notice only two or three. A receipt was produced dated some months before the death of *William Barclay*. *Barclay* was then collector of taxes, and the receipt was in 1815, from *William Barclay* on account of taxes and exempt fines, twenty dollars per *Robert Anderson*; this signed by the treasurer. We are of opinion that on the face of this receipt, it ought to be taken that *Barclay*, who lived more than twenty miles from *Lancaster*, sent this money by *Anderson*. There was no other legal evidence on this point. This item should be struck out of the account.

Certain articles specified in the inventory were not in the ven-

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due paper. Some of these were admitted by the widow to have been kept by herself; some, viz. a cow, two chaff beds and bedsteads, and some cloth, &c. she denied having, and wished the amount to be charged to *Anderson*. There was not even an allegation that he took any of these articles into his own possession.

The tavern books of the deceased amounted to above six hundred dollars, only a little more than one hundred of these had been collected. The proof was, that the books were left with the widow. Her counsel alleged that *Anderson* was liable for those goods, and for the balance of those accounts; no proof was given that any of them could have been collected, except what are accounted for. Each executor has equal power over the goods of the deceased; one cannot take them from another, nor recover them by any process at law. If one have the exclusive possession of goods, or of credits, the other is not liable for those articles, at least, not of course; for though it is settled, that if one executor contribute or assist in any way to enable the other to obtain possession of the assets, he shall be liable for them, yet if he is merely passive, and does not obstruct the other in obtaining or keeping the assets, he is not liable. This is the general rule; there may be cases of such gross conduct as would form exceptions.

By an act of assembly, either creditor or legatee may, on application to the Orphans' Court, compel an executor who is likely to waste the goods to give security; it does not mention that one executor may as executor compel the other to give security. Now, it is highly unreasonable that the legatees or creditors having power by express law to secure themselves, should lie by, and then ask indemnity from the other executor, who had less power to restrain, or prevent the evil than each of them had. We see no ground for charging *Anderson's* estate with any thing on these accounts.

The estate was very small, and we have no evidence of any trouble or expense by *Anderson* which will justify the allowance of sixty dollars to him on this account. We reduce his allowance to forty dollars, and, with these alterations, the account is confirmed.

Decree affirmed.

[LANCASTER, NOVEMBER, 1827.]

KAUGHLEY *against* BREWER.

IN ERROR.

The book of a tailor to whom cloth is delivered to make a garment, and who swears, that it is his book of original entries, and that the several entries were made at the time each bears date, but states that after he had cut out the work, and delivered it to the journeymen who lived in the house with him, he made the charge, and that this was the manner in which he kept his books, is admissible in evidence.

The opinion of the court was delivered by

HUSTON, J.—The plaintiff, who was plaintiff below, produced his book of charges for work done as a tailor—not a merchant tailor, who found the cloth and trimmings, and made the coat, &c., but one of those who, as is usual in the villages and country, in this state, make into garments the cloth brought to their shop by their customers. He proved the book to be his book of original entries, and that the several entries were made at the time each bears date; but in answer to a question, he stated,—“After I have cut out the work, and when I deliver it to the journeymen, I make the charge. The journeymen work in the house with me.” That this was the manner in which he had kept his books.

The books were rejected by the court, and exception taken.

This case has received very careful consideration; it is not clear of difficulty, and the court is not unanimous.

It has long been settled that a storekeeper's, a tradesman's, or a day labourer's book of original entries of goods sold, or work done, is evidence to go to a jury; and, so far as I know, very little complaint has existed on account of such decision. In 4 *Serg. & Rawle*, 5, this court, as has been supposed, went one step further, and received a book containing entries of lime sent from a kiln to *Philadelphia*, to be given in evidence. These entries must have been made several hours before the delivery, and without an absolute certainty that the lime would be delivered; but it was necessary to admit such evidence, or impose difficulties on that business which would be great to the seller, and eventually increase the price to the buyer, without being of any general advantage. It is difficult to lay down any other rule than that such mode of keeping books as is usual and known to all tradesmen in the same business, and all customers, cannot be safely declared bad by a court. It is known that in some trades the work is in hands for several days, and goes through more than one hand; and if the entry is made during the period of its manufacture, or at a stated time when it has progressed a certain length, I can see no objection to it, which does not apply with equal force to the whole, and which would not

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equally forbid entries to be made by the tradesman from being received at all.

We do not say a shopkeeper can charge goods not yet measured or weighed off; nor a tradesman work not yet begun: but we hesitate, when it is asked of us to say, that a blacksmith who has prepared all the iron work of a wagon ready to put on the wood, and who weighs it, (it is usually done by weight,) and then charges it in his book, and proceeds to finish his work by putting it to the wood, which employs him a week, shall lose the price of his man and work, or the evidence of it, which is the same thing, or chair-maker who makes and paints the chairs, and charges them before he sends them to be gilt, shall not read his book of original entries. In the case before us we think it is governed by the case in 4 *Serg. & Rawle*, before cited; and that a tradesman who makes his entries after the work is begun, gone through one hand, and is in progress with him who is to finish it, may read his book if no other objection is made to it. Where the cloth was furnished by the customers, we may assume that he will call for the coat. In this case we think the evidence ought to have been received.

GIBSON, C. J., and ROGERS, J., concurred.

TOD, J., dissented.

Judgment reversed and a *venire facias de novo* awarded.

END OF MAY TERM—LANCASTER DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

MIDDLE DISTRICT—JUNE TERM, 1827.

[SUNBURY, JUNE, 1827.]

HEWITT *against* FURMAN.

IN ERROR.

Where the plaintiff and defendant submitted to arbitrators, under an arbitration bond, and when no suit was pending, a matter in dispute between them relative to a certain grist mill, and five acres of land on which the said mill stood, together with all books, accounts, debts, and demands, of whatever name or nature, and the arbitrators awarded to the plaintiff one-third part of the saw mill, and one-third part of the mill yard, and one-third part of the privilege of the water, and a sufficient quantity of land to make in all two-thirds of five acres, bounded, &c., to be so surveyed as not to include the defendant's dwelling-house and barn; and the said plaintiff to remove a certain grist mill adjoining the said saw mill within the term of three months: *Held*, that on the face of the award it was not void, and that whether it was invalidated or supported by the parol evidence given by the parties, the jury were to decide.

If the submission contains matters which are not brought before the arbitrators, the award is not void, because they did not act upon such matters.

If arbitrators under a submission, when no suit is pending, award costs, and subjoin a bill of costs to the award, it is good.

WRIT of error to the Court of Common Pleas of *Tioga* county, in an action of debt brought by the defendant in error, *Aaron Furman*, against the plaintiff in error, *Dudley Hewitt*.

The cause was argued by *Kinney*, for the plaintiff in error, who cited *Kyd on Awards*, 394, 395, 396. 13 *Johns.* 264. 9 *Johns.*

(Hewitt v. Furman.)

43. *Spalding v. Irish*, 4 *Serg. & Rawle*, 322. *Murray v. Murray*, 6 *Serg. & Rawle*, 276. *Levering v. Gorgas*, 4 *Dall.* 71. 2 *Saund.* 62. 1 *Str.* 116. 1 *Bac. Ab.* 213. 13 *Serg. & Rawle*, 322. 2 *Yeates*, 539. 4 *Dall.* 174, 119. 6 *Binn.* 224. 3 *Serg. & Rawle*, 340. 4 *Dall.* 285. 3 *Yeates*, 567. 1 *Dall.* 175. And by

Lewis, contra, who cited *Solomon v. M'Kinsey*, 13 *Johns.* 27. 5 *Bac. Ab.* 707. *Van Allen v. Ambler*, 14 *Johns.* 96. *Strong v. Ferguson*, 14 *Johns.* 161. 15 *Johns.* 197. 2 *Yeates*, 539. 6 *Binn.* 333.

The opinion of the court was delivered by

HUSTON, J.—*Aaron Furman*, the plaintiff below, brought debt on an arbitration bond; issues were joined on the pleas of no award and covenants performed.

The material parts of the submission were as follows:—

“The parties do submit all matters in variance, &c., to, &c.; that is to say, a matter in dispute between us relative to a certain grist mill and five acres of land, on which the said mill stands, together with all books, accounts, debts, and demands, of whatsoever name or nature,” &c.

This being read, a paper containing the award of the arbitrators, under their hands and seals, was offered in evidence, and objected to. The material part was as follows:—

“We do award, arbitrate, and determine, that the said *Dudley Hewitt*, his heirs, executors, or administrators, shall deliver to the said *Aaron Furman*, one-third part of the saw mill and one-third part of the mill yard, and one-third part of the privilege of the water, and a sufficient quantity of land to make in all two-thirds of five acres, bounded, &c., to be so surveyed as not to include *Dudley Hewitt's* dwelling-house and barn; and the said *Aaron Furman* is to remove a certain grist mill adjoining the said saw mill, within the term of three months. And each party shall pay the one equal proportion of the costs that have accrued *in this suit*.” I would just observe, that as there was no suit, it must mean, in this arbitration.

There was an objection to admitting this award in evidence: it was set out in the pleadings, in the plaintiff's replication, and issue taken on it. The defendant might have demurred to it, if he believed it clearly void for uncertainty; or he might intend by evidence to prove, that, when considered with relation to facts, and location and places, it was absurd; and it appears he did attempt such proof. There was no error in admitting it in evidence; for even if suspicious on its face, the plaintiff might and did support it by evidence.*

* No parol evidence appeared upon the record, as it came into the hands of the Reporter.

(Hewitt v. Furman.)

There was afterwards an opinion of the court, that on the face of the award it was not void, and whether invalidated or supported by the parol evidence given on both sides, was left to the jury.

There are many cases of common occurrence in some parts of this state, to which there is nothing similar in all our books. Nothing is more common than an agreement that A. shall settle on a piece of vacant land, and by his residence and raising grain put himself in a situation to take out a warrant; that B. shall pay the price of the warrant and survey and patent, and then the land to be equally divided between them; but the division lines to be so run as to leave the house and cleared land in the part allotted to A., the actual improver. It is of ordinary occurrence, that two or more shall agree to buy a few acres for a saw mill; and erect it in partnership; if one of them wishes to build a dwelling-house, and the others are single men, nothing hinders them from agreeing that he may build a house, and, that on a partition, his part shall be so located as to include his house. In the case before us, suppose there were originally three persons concerned, and they agreed as above, that *Dudley Hewitt* might build a house. One of the three, wishing to quit, sells his share of the saw mill, yard and water right, to *Hewitt*, and his share of the land not used with the mill to *Furman*. This will bring the rights of the parties precisely to agree with the award. But it is said it might be impossible to make partition according to the award. Be it so. Our laws contemplate such cases, and provide that the property may be sold, and the money divided. The hundredth part of a house, a mill, a furnace, &c., cannot easily be set off in severalty, and without a Court of Chancery, it may not be easy to do much with an interest of that kind. The other parties may, however, deny that one of the tenants in common has any interest, or so large an interest as he claims, and he may bring an ejectment. The jury find he has an interest, and define precisely what that interest is. The verdict is good, though it may be impossible to procure it to be set off in severalty in a writ of partition. The above, then, might have been good as a verdict, and therefore may be good as an award. The jury, on all the evidence, found it a good award. If we can suppose a state of facts on which an award would be good, I think we would, on demurrer, be bound to suppose such facts existed; but, after a trial and verdict, we are clearly bound to assume that to be the case.

It does appear, that it was expected that the arbitrators should make the partition. They have settled the right and interest in the premises. As was said before, it may be impossible to make partition.

The submission mentions books and accounts, and it was objected that the award makes no mention of, or decision of, any such matter. If there had been any dispute about these, and they had been submitted to the arbitrators, and they had not acted on them,

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this might have been proved to the court and jury; but no such proof was offered, and in such case the intendment is, that the arbitrators acted on all that was laid before them. The law on this subject has been so long settled, and the principle on which it is founded is so plain, that it ought not to be questioned at this day. Another objection was made as to costs. As the costs are always part of the dispute, it seems strange there ever was any doubt about the power of the arbitrator to award costs. It seems, however, to have become the settled law in *England*, that in a suit pending, the arbitrator, unless otherwise stipulated in the submission, or directed by law, may award costs, and they are taxed by the officer. But, in a case referred, and no suit pending, an award of costs is bad, because there is no person to ascertain them; an award of a precise sum as costs is good, for it is certain. In this case the arbitrators made a bill of the costs, and subjoined it to the award. The objection, then, for uncertainty, does not apply. The judgment is affirmed.

Judgment affirmed.

[SUNBURY, JUNE, 1827.]

BROWN *against* HONNETER.

IN ERROR.

If the grounds of a motion to strike off an appeal from the judgment of a justice do not appear to have been upon the record, when the court decided upon it, the refusal to strike off the appeal cannot be assigned for error.

ON a writ of error to the Court of Common Pleas of *Lycoming* county, it appeared that *James Brown*, the plaintiff in error, brought suit before a justice of the peace against *George Honneter*, and, on the 21st of *July*, 1824, obtained a judgment for eighty dollars forty-seven cents. The defendant appealed, and, from the record sent up to this court, it appeared that the transcript of the justice merely stated that, on the 10th of *August*, the defendant entered bail and appealed from the judgment. The appeal was duly entered in court, and, on the 4th of *September*, 1824, on motion of the plaintiff's counsel, a rule was granted to show cause, on the first day of the next term, why the appeal should not be struck off. On that day the rule was discharged. The cause was then tried before arbitrators, who found an award in favour of the plaintiff for ninety two dollars sixty cents. The defendant appealed from the award, and afterwards, upon a trial before the court and jury, obtained a verdict. The plaintiff then moved in arrest of judgment, for the following reasons:—

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1. Because no appeal was made by the defendant, from the judgment of the justice within twenty days.

2. Because it does not appear that any *person* entered special bail for an appeal from the judgment of the justice.

3. Because it does not appear that special bail was entered in a *sum*, to cover the sum in controversy, all the costs, counsel fee, and daily pay which the defendant should be bound for, in case the judgment of the justice should be affirmed by the court, or the plaintiff recovered more than the amount of the judgment of the justice, or in *any sum* whatever.

The court below refused to arrest the judgment, and the plaintiff took a writ of error.

The opinion of the court was delivered by

HUSTON, J.—If it appeared that the objections made on the motion to arrest the judgment, had been made and decided on by the court when they refused to strike off the appeal, there would be such error, as that we must, however reluctantly, reverse the judgment. There is nothing on the minutes or record to show on which of the above grounds the application to strike off was made; and there is strong reason to believe it was not on the latter ground. The justice does not even pretend to send up the recognizance of bail; this is usually done; but, though not done, the court will grant a *certiorari* to the justice to send it up at any time. It would be a strange supposition, that the court below had determined that an appeal could be sustained without having entered bail, or that the matter would have been decided without a *certiorari* to the justice. That this objection was not taken below, is apparent on the whole return. To reverse, on mere form, a verdict and judgment, requires more than surmise—more than a possibility that error existed. In every case, the party objecting has it in his power to put on the record the very point made to the court trying the cause, and their decision on that point; and, if we must reverse, it ought to be when we know the very matter decided, and that it was decided wrong. It will not do to reverse a verdict and judgment, and deprive the party of the effect thereof, for any other reason than an error specific and defined on the record. The motion to strike off an appeal is sometimes founded on something apparent on the transcript of the justice as returned, and may be on facts extrinsic. Before the court decide, diminution may be alleged, and the record made more complete—or some evidence given; as, where the party appealing is rich, and says, in presence of the other party, “I will go for surety, and appeal”—his opponent replies, “You are good enough yourself—I ask no other bail:” and the justice, on this, takes the recognizance of the man himself. Now I apprehend no court would after this, permit a party to object, and deprive his opponent of trial for a reason which he had expressly waved. If this matter is decided on proof of

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facts, that should appear. The man who objects, ought to see that the matter, and the whole matter is put on the record; for after a full and fair trial, I repeat, we would not readily deprive a party of the benefit and effect of it, and send him back irretrievably bound to pay what we see he does not owe.

Judgment affirmed.

[SUNBURY, JUNE, 20, 1827.]

The President, Managers, and Company of the CENTRE and KISHACOQUILLAS TURNPIKE ROAD COMPANY, v. M'CONABY.

IN ERROR.

The charter of a company incorporated for public purposes cannot be declared void, collaterally, in a suit brought by the company to compel performance of contracts made with it. If the charter has been fraudulently obtained, it can be vacated only by this court, either by *scire facias* to repeal the charter, or to declare it forfeited, or by writ of *quo warranto*, at the suit of the state. Where a charter has been obtained by means of fictitious subscriptions for part of the stock, and a fraud has been committed on a real subscriber, by which he has sustained or might sustain injury, no action can be maintained against him by the corporation, for the amount of his subscription; but where such subscriber has accepted the charter, and by his own acts put it in operation, he cannot avail himself, as a defence, of the fact, that part of the stock was fictitious.

THE plaintiffs in error brought this action in the Court of Common Pleas of *Mifflin* county, against *James M'Conaby*, the defendant in error, to recover the amount of his subscription for five shares of the stock of the company.

The company was incorporated by virtue of an act of assembly passed 7th *March*, 1821, which provided, that when six hundred shares had been subscribed, the commissioners should certify that fact to the governor, who should thereupon incorporate them by the name of "The President, &c." The company was incorporated on the 9th of *November*, 1821.

Several bills of exceptions taken by the defendant, to evidence offered by the plaintiffs, and admitted by the court, were returned with the record; but the course which the cause afterwards took, renders it unnecessary to state their contents.

The defence relied upon was, that three hundred out of the six hundred shares certified to the governor to have been subscribed, being fictitious, or subscribed by insolvent persons, the charter was a nullity, and the company could maintain no action.

In the course of the trial, the defendant offered *Cornelius M'Donald*, to prove that one of the commissioners called upon him to

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subscribe for stock to this company: That upon asking the meaning of it, he was told, it would not come to any harm; he never would be called upon: That the commissioners wrote his (*M'Donald's* name,) and that he had no property.

This testimony was objected to by the plaintiffs' counsel, because the witness offered was a stockholder, and his evidence would tend to contradict the certificate of the commissioners. The court admitted the evidence; upon which a bill of exceptions was tendered and sealed.

The defendant then called *James Brown* to prove what one of the commissioners told him at the time of subscribing, and to explain the manner in which his subscription was made. His evidence being also objected to on behalf of the plaintiffs, the court admitted it, and sealed another bill of exceptions.

The petition of *Thomas Nicholson*, for the benefit of the insolvent laws, was then offered by the defendant, objected to by the plaintiffs' counsel, and admitted by the court, to whose opinion exception was again taken.

After some further testimony had been given in support of the defence, the plaintiffs called a witness, who testified, that he was one of the commissioners appointed to procure subscriptions to the stock of this company. That he saw *James M'Conaby* subscribe his name for the five shares, which are the subject of the present controversy. That he got all the stock subscribed except a few shares, which he particularized, two of which he knew nothing about: That after the law was passed, and the state had granted twenty thousand dollars to be paid after the completion of the road, he (the witness,) having had some experience in making turnpikes, made a calculation of what the expense would be, and was satisfied, that if three hundred shares of good stock could be procured, they, with the state subscription, would be sufficient to complete the road: That the commissioners met in the fall of 1821, and the books were then opened with the real stock: That there were from two hundred and ninety to three hundred shares of good stock subscribed: That the commissioners consulted as to the mode of proceeding, when he (the witness) exhibited his calculation: That it was believed impossible to get three hundred shares more of good stock subscribed, and the commissioners discussed the question, whether to apply to the legislature, or to take three hundred shares of fictitious stock: That the commissioners were unanimously in favour of the latter plan, and thought there was no impropriety in it: That they agreed a certificate should be made out with the good stock, and a blank: That he (the witness) made out a certificate in blank, which he and the other commissioners signed: That the commissioners did not meet again, but went on to obtain the fictitious stock

On being cross-examined, he said, that he at all times be-

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lieved that three hundred shares of good stock, with the state subscription, would complete the road. He would not say he mentioned this in the presence of *James M'Conaby*. He never obtained a subscription from any citizen of this town, under an intimation that the whole stock should not be paid. He had a faint recollection that one person whose name was in his, (the witness's) hand-writing, told him to sign. He knew that person could not pay when he wrote his name in the book. About three hundred shares were considered fictitious stock. The witness heard no complaint from any stockholder until after the first election. There was no call of the stockholders, or any information given to them, of the intention to fill up subscriptions with fictitious stock.

The plaintiffs then offered to prove the amount of stock actually paid by the stockholders; that the state subscription had been paid; the amount of debts due by the company, and to whom they were due; that the road was completed, and that the defendant voted by proxy. The evidence thus offered was objected to by the defendant's counsel, and the court having sustained the objection, another bill of exceptions was tendered and sealed.

The President then charged the jury as follows:

"As this cause affects the company vitally, and a large portion of subscribers who have not paid, I had determined to receive all the plaintiffs' testimony in order to bring their whole case upon the record. After some shy fighting, the company have come fairly out with the facts. They have proved, and now admit there was about three hundred shares of fictitious stock, and that this stock was taken on consultation and deliberation, and on it the charter was obtained. I am glad they have done so. I think they deserve credit for making this full disclosure and statement. But I must decide,

1. "That the charter and the money of the state having been obtained in this way, the charter is vacated, and the company can sustain no suit as an incorporated body.

2. "That as by law no charter could be obtained until six hundred shares were subscribed, every man who subscribed, did it under the law, and according to law; and when the charter was obtained on only three hundred shares, each subscriber may have to pay twice as much as would have been necessary if the six hundred shares had been subscribed. This conduct of the commissioners, released the defendant from his subscription. In other words, on the testimony of the plaintiffs, in which it is admitted the facts are distinctly stated, the plaintiffs cannot recover.

"At the request of the plaintiffs' counsel, I add, that no conduct of the defendant could validate this charter, or enable the company to support a suit as an incorporated body. Whether the defendant may be liable to individuals in some way, it would be improper to decide in this case."

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To this opinion the plaintiffs' counsel excepted.

Potter, for the plaintiffs in error.

1. *Cornelius M'Donald* was interested. He was a stockholder, and his evidence tenders to discharge his liability for his own stock, by destroying the charter. He was incompetent to contradict his own act and the certificate of the commissioners, who were public officers.

2. The evidence of *James Brown* was also admitted improperly. The company are not to be affected by acts to which they were not a party, and which are done beyond the scope of the law. The commissioner, whose declarations were admitted, might himself have been examined. His declarations were therefore merely secondary evidence, and inadmissible. The acts alone, and not the declarations of the commissioners, can affect the corporation. 11 *Serg. & Rawle*, 291. 4 *Serg. & Rawle*, 321. 1 *Serg. & Rawle*, 526. 8 *Serg. & Rawle*, 225. 19 *Johns*. 245.

3. In receiving the petition of *Thomas Nicholson*, the court below was in error. A man of that name was a subscriber, and a man bearing the same name presented the petition; but there was no evidence of their identity. Independently of this, a petition with no further proceeding upon it is not evidence to affect third persons. It is nothing more than the declaration of the petitioner, and it will not be pretended, that the declaration of *Nicholson* would have been evidence against the company.

4. The plaintiffs had a clear right to give in evidence the acts of the defendant, to show he waived all objection on account of irregularities in obtaining the charter.

5. It was improper to decide positively that the charter was void, and the most disastrous conveyances would follow the confirmation of such doctrine. It requires a legal proceeding, instituted with a view to that object, to declare a charter void. The question cannot be decided collaterally. 5 *Johns. Ch. R.* 377. 5 *Johns. Ch. R.* 370. 4 *Mod.* 52. 3 *Burr.* 1872. The plea of non-assumpsit, admits the existence of the company. 14 *Johns.* 238. Besides, the defendant being named in the charter, and having voted by proxy, is estopped from denying, that it was legally obtained. 10 *Johns.* 100. 10 *Serg. & Rawle*, 273. He referred also to the confirming act of 10th of *April*, 1826. *Pamph. L.* 324.

Blythe, contra, said, that the first three exceptions, were destroyed by the plaintiffs' admission of the facts attempted to be proved.

The question is, whether the defendant has assumed the payment of the money, for which he is sued. It was no confirmation of the charter to vote by proxy; and this is the only act given in evidence, which has the slightest appearance of confirmation.

Even if the charter be not void, the defendant has a good defence. He agreed to pay only according to the provisions of the

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act of incorporation, which has been violated in the most important part. The obligation is, therefore, no longer binding on the defendant. The case of *The Hibernia Turnpike Road v. Henderson*, 8 *Serg. & Rawle*, 219, goes the whole length. The defendant's liability was the only question before the court below; and if the court is right as far as the facts of the case raise a question for its decision, it is enough. Mistake in an abstract position, such as the validity of the charter, is not error.

The opinion of the court was delivered by

DUNCAN, J.—This was an action brought by the corporation against the defendant to compel payment of the amount of the subscription of the defendant, one of the seven first named persons in their charter, and who accepted the charter, and acted under it by giving notice of the election to be held for president and managers of the company, and who voted by proxy at the said election.

The defence was, that the charter was obtained by means of the subscription of three hundred shares of fictitious stock to make up the number of subscribers required by the law, and that the charter, obtained by this deception on the government, who on the faith of it subscribed twenty thousand dollars, four hundred shares, was a nullity, and that the corporation could sustain no action.

This defence was sustained by the court, *and the court likewise decided, that no conduct of the defendant could enable the corporation to support this action, against him for his subscription.*

The serious public consequences, and the injury inflicted on the stockholders, who have paid their money for making the road, and on the government, who have paid the large sum of twenty thousand dollars, all which is lost and forfeited, if this decision be a correct exposition of the law, makes this a very important question; for if it be so as to this corporation, other turnpike companies are involved in the same ruin. But, however tremendous the consequences may be, it would be no reason for reversing this judgment, if the law be as it is laid down by the court. But it is a reason for examining the doctrine with great care and deliberation. When the case of *The Hibernia Road* was under consideration, I stood alone in my opinion; but the opinion of the majority became the law of the land, and affords a rule of construction of all these turnpike laws. The legislature by subsequent laws remedied the evil, growing out of the decision, without impugning the decision itself, which it was not within legislative power to do. That decision has been misunderstood and the judges who made it, sensible that it was necessary to avoid misconception, declared that they must not be understood as making any insinuation against the validity of the charter; and the opinion was confined to one matter, the liability of the defendant to pay for his stock,

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because he had not paid five dollars on each share, at the time of subscription, which was supposed to be in direct opposition to the act of assembly. The court declare they will not say, that the company came fraudulently into existence, though the law was disobeyed, or that the charter would be void, if it had. If this charter was deceptively obtained, obtained by false representations, it could not in a collateral action, in an action brought by the company to compel the performance of contracts entered into with it, be declared void. But if this charter had been fraudulently obtained, on which I am not called upon to give any opinion, still, until that question had been directly decided, in a proceeding instituted in this court, which alone has jurisdiction, either by *scire facias* to repeal the charter or declare it forfeited, or by a writ of *quo warranto* at the suit of the state, in which the state must be a party, and a party to the judgment for the seizure of the franchise, there is no instance of calling in question the right of a corporation, for the purpose of declaring its charter void, but at the instance, and on behalf of the government, and never on the relation of any individual. *Commonwealth v. Union Insurance Company*, 5 Mass. R. 230. *Attorney General v. Utica Insurance Company*, 2 Johns. Ch. R. 389. 5 Johns. Ch. R. 381. The state may waive the right to exact the forfeiture, or declare the charter void, because obtained by deception; and here the state, it cannot be presumed, ever would do an act so detrimental to herself, in a pecuniary view, so injurious to the interest of the commonwealth in a public view, and so ruinous to the individuals, who, on the faith of the charter, have paid their money. It is sufficient to say, that the state has not interfered, and that until it does, and the charter is vacated by a judicial decision of this court, either on a *scire facias* or a *quo warranto*, the charter is a subsisting one, and they have a right to sustain an action. The corporate claim to sue and be sued remains. I speak now of public institutions for public purposes, and not of mere literary or charitable corporations created for private purposes. But whether they could sustain this action against the defendant, is another question, and this would depend on the question, whether a fraud has been committed on the defendant, by which he has sustained, or possibly could sustain a loss, by means of this fictitious subscription. It is a question *ad hominem*, and not by way of impeaching the charter. It is, in a great degree, a question of fact; for, if this defendant has accepted the charter, acted upon it, was one of the seven in the charter, advertised the election for managers, and voted by proxy, I do not think he ought to be heard against the payment of his subscription. It does not lie in his mouth to object; nor do I think ignorance of the fact of the subscription being partly fictitious, should now be heard from him, if it were possible to doubt of his knowledge, because he, by his own public acts, has put the charter into motion: he has

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encouraged the state to pay for the four hundred shares, and the individual subscribers to pay their subscriptions; he has suffered the road to be made at great public and private expenditure, he stands in a different situation from others who have not so conducted themselves; he has put his name to the fraud, if fraud it be; he has been an actor in the scene of fraudulent deception, of which he now seeks to avail himself, to the injury of the innocent, and he who assisted in putting the charter into action, cannot be permitted to say, to those who have innocently advanced their money and completed the road, the charter under which they acted was obtained by fraud upon the subscribers, and on the state. He should have informed himself of the fraud and declined to act. His ignorance of that, which it was his duty to know, shall not protect him, particularly when, in its consequences, it is injurious to others. He voluntarily became a member of the corporation, accepted the charter, acted upon it, put the whole matter into motion, encouraged the work: in this, so far as respected the claims against him, he acted at his peril.

These principles are by no means opposed to the matter decided in *The Hibernia Turnpike Company v. Henderson*. The decision itself, has no relation to this case. It did not pretend to touch the charter. On the contrary the majority of the court who decided in favour of the defendant, emphatically declared, that the charter was not affected. The apprehensions as to the consequences of the doctrine of the judge who dissented, were removed by this disavowal, and the inconvenient results were provided against by a subsequent law. If the doctrine above stated be correct, it is almost needless to decide the main points on the exclusion of the evidence offered by the plaintiffs, of the defendant's notification, in his official character, as one of the first seven named in the charter, of the election of the officers of the corporation. His voting at the election by proxy, the amount of the stock actually paid by the stockholders, the payment of the state subscription, the amount of the debts due by the company to them, and the perfect completion of the whole work, certainly all this is evidence to show, that the fraud now would be in the defendant (in withholding payment) on the government, and on the individual stockholders, and not on him.

The court is not to scrutinize the secret motives of the defendant in this defence, but it was candidly admitted by his counsel in the argument, that it arose from some disappointment in the election of the managers and officers of the institution; as it was likewise candidly admitted, and proved by the plaintiffs themselves, that three hundred subscriptions were fictitious, which, however little worthy of commendation, appears not to have been clandestine, but notorious; not confined to this corporation, but practised generally.

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This case, if it fell within the provisions of the healing act of the 10th of *April*, 1826, required not its aid, because this defendant stood in that situation, that he could not avoid payment on account of stock having been subscribed fictitiously by persons deemed insolvent. The act, is, however, so far important, as to show, that the state, instead of desiring the repeal of the charter or a divestment of the corporate rights of the corporation, ratify it, *notwithstanding the charter of the company may have been obtained, by reason of stock subscribed fictitiously, or by persons deemed insolvent*; and if they had a right to call in the charter, by a judicial condemnation, they waive the forfeiture, as the exaction of it would be an immense public evil.

Judgment reversed, and a *venire facias de novo* awarded.

[SENBURY, JUNE 20, 1827.]

M'ALLISTER *against* HOFFMAN.

IN ERROR.

Money bet upon an election, and deposited with a stakeholder, who after the event of the election is known, has notice not to pay it over to the winner, may be recovered back by the loser.

It appeared from the record of this case, returned on a writ of error to the Court of Common Pleas of *Mifflin* county, that in the court below it was an action brought by the plaintiff in error, *Hugh M'Allister*, against *John Hoffman*, the defendant in error, to recover the sum of one hundred dollars deposited in the hands of the defendant as a stakeholder, on a bet upon the result of the last election for governor of *Pennsylvania*. The wager was made by the plaintiff and one *William Turner*, who each deposited with the defendant the sum of one hundred dollars, to be paid to the winner when the result of the election should be ascertained. After the event of the election had become known, but before the money was paid over to the winner, the plaintiff, who was the loser, called on the defendant and forbade his paying the money to *Turner*. The parties then went to *Turner*, when the plaintiff offered to give him credit for the amount of the bet on the county docket. This *Turner* refused, alleging that the money did not belong to him, but to another person who had left it with him to make the bet; a fact which it appeared was known to the plaintiff. There was evidence that the defendant was indemnified before he paid over the money to the winner.

(M'Allister v. Hoffman.)

The court below charged the jury in favour of the defendant, and among other things instructed them that, "If upon the whole they believed that no notice was given to the defendant by *M'Allister*, until the result of the election was ascertained, it would be against the policy of the law to interfere in his behalf, and he is not entitled to maintain this equitable action."

The plaintiff below excepted to the charge, and on the return of the record to this court,

Blythe and Potter, for the plaintiff in error, said, that *Vischer v. Yeates*, 11 *Johns*. 23, in which the arguments and authorities on the subject are fully stated, was precisely the case before the court. The plaintiff does not claim through an illegal contract, but disaffirms the contract. Knowledge of the event of the election, does not alter the case. 12 *Johns*. 376. 1 *Lord Ray*. 89.

Banks and Blanchard, contra. If the law has been violated by the wager in question, the loser might with a better grace have prosecuted the winner, than have shown himself on the civil side of the court, which involves a breach of faith on his part. The action is an equitable one, and the bet being only *malum prohibitum*, there is nothing against conscience in the defendant's retaining the money. To decide otherwise, would be to give the dishonest a very unequal advantage over the honest man. The stakeholder is bound in good faith to pay over the money to the winner, and the case in 11 *Johns*. 23, in which the contrary doctrine was upheld, was reversed in the Court of Errors and Appeals. To permit the plaintiff to recover back the deposit, would be an infraction of a well settled principle of law. He cannot recover without showing the illegal transaction; and whenever that is the case, the courts uniformly refuse to lend their aid. *Seidenbender v. Charles*, 4 *Serg. & Rawle*, 151. *Levan v. Scott*, 11 *Serg. & Rawle*, 155. If the legislature had intended to permit money to be recovered back in a case like this, they would have said so, as they did in the act of the 22d of *April*, 1794, 1 *Purd. Dig.* 318, against gaming and lotteries; and in the act of the 24th of *March*, 1817, *Purd. Dig.* 233, against horse-racing.

The opinion of the court was delivered by

GIBSON, C. J.—The result of the authorities undoubtedly is, that the loser may withdraw his stake at any time before actual payment to the winner. If then such be the rule in regard to those wagers that are void only by the policy of the common law, how much more reason is there for enforcing it when public policy has received the sanction of positive enactment? To the act of wagering on an election, the act of assembly not only annexes a penalty, but in terms declares the contract to be void; and as in construing remedial statutes, the main thing is to make such a construction as will repress the mischief and advance the remedy, we are to determine whether the practice of betting on elections would not be

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more effectually cut up by suffering the loser to regain what he has lost at any time before it is delivered to the winner, than by narrowing the *locus penitentiae* to the interval between the period of betting and the happening of the contingency; and it is impossible to doubt but that it would. A different conclusion would be a virtual repeal of the clause which declares the contract to be void. It will be conceded that bets are seldom if they are ever made with a view to be revoked; and nothing would be more easy if that were sufficient, than for the parties to preclude themselves from taking the advantage held out by the law, by depositing in the hands of a third person; and in such a case, to expect either to retract before the determination of the bet is known, is just as reasonable as to expect the banker at a gaming table to avail himself of the *locus penitentiae*, while the card is trembling in his hand. In either case the hope of gain which was the original inducement to the bet, continues to operate; but in the case of the political bet there are the additional incentives of party spirit, and the sinister consequences to be apprehended from an implied admission of numerical inferiority on the side of the party in favour of whose success the bet was made. It may be said the same arguments would prove the right of the loser to maintain an action even after the money were paid over. I confess that I think the decisions ought originally to have gone that length. In *pari delicto*, is not a maxim of universal application; for where money has been paid on a contract which is illegal, merely because it is in violation of a rule which has for its object the protection of weak and necessitous men, it may be recovered back; and for the very reason that the rule itself would be frustrated by any other construction. The books contain many cases of the sort. Had the courts in cases of positive prohibition marched directly towards the object proposed by the legislature, instead of stopping to determine degrees of criminality, or fastidiously turning aside from the supposed turpitude of the transaction, they would have saved themselves the trouble of many a nice and useless distinction. What has the relative demerit of the parties to do with the prostration of the original cause of offence to the public; short of which a judge should not suffer himself to pause? By this I do not intimate a desire to overturn what has been established by many of the wisest and best judges which this country or that of our ancestors has produced. In the case before us there is the less reason to do so, as the legislature has evinced by other laws that it was aware of the rule which prevents money that has been paid on an illegal contract from being recovered back; as in the case of money paid in violation of the act against horse-racing, which it is expressly declared may be recovered from the winner. But we will not stop to inquire whether the loser claims through the illegal transaction, or paramount on his original right of property; or whether, having done all in his power to complete the contract, it would be inequitable to permit him to

(M'Allister v. Hoffman.)

withdraw his bet after the risk has been borne by the other party: such considerations must yield to the policy which dictated the prohibition, and which requires that it shall not be eluded under any pretence. Whatever repugnance, therefore, we may feel to the claim of the plaintiff we are compelled to say there is nothing in the way of his recovery.

Judgment reversed.

[SUNBURY, JUNE 20, 1827.]

BEALE and others, Executors of BEALE, *against* The COMMONWEALTH, for the use of W. and C. MARKS.

IN ERROR.

In debt on recognizance against the surety of the sheriff, the declaration assigned as a breach, that the sheriff by virtue of an execution levied on property, and received certain sums of money which he did not pay over. It was assigned for error that no judgment was averred. Court equally divided, and judgment for the plaintiff affirmed.

It cannot be assigned for error that the execution produced varied from that stated in the narr., in the Christian name of one of the plaintiffs in the execution.

If a new declaration be filed with the leave of the court, and the defendant go on to trial on the former plea, he is considered as abiding by his former plea.

WRIT of error to the Court of Common Pleas of *Mifflin* county.

Debt in the court below on recognizance against the plaintiffs in error, executors of *W. Beale*, one of the sureties of *T. Beale*, sheriff of that county. To the declaration on the recognizance the defendants had pleaded payment, with leave to give the special matter in evidence; and issue was joined thereon.

Afterwards, on application of the plaintiff, the court below granted leave to file a new declaration, and withdraw the former one. A new narr. was filed, but the former was not withdrawn. It did not appear that to the second declaration, any plea was entered or called for. The new declaration, after setting out the recognizance and the condition of it, alleged for breach, that, "While the said *Thomas* so continued sheriff, he, by virtue of a writ of *fieri facias* out of the Court of Common Pleas of said county, to him directed and delivered, at the suit of *William* and *Christopher Marks* against *Samuel Belford*, made a levy upon *Belford's* property, (specifying it,) and at seven different payments from *Belford*, (specifying the date and sums) received from him on the execution, one hundred and eleven dollars and fifty cents;" and stating a refusal to pay over the same or any part to said *William*

(Beale and others v. The Commonwealth, for the use of W. and C. Marks.) and *Christopher*, though often required, &c. The errors insisted on in this court were:

1. The admitting a new declaration when the cause was at issue, without consent of defendants.

2. The second declaration, even supposing it to be legally a part of the record, sets forth no cause of action. It has throughout the names of *William* and *Christopher Marks*, instead of *William* and *Christian Marks*, as in the writ. No execution in favour of *William* and *Christopher Marks*, was, or could be produced.

3. There is neither plea nor issue on the new declaration.

4. Neither in the first nor second declaration is there any judgment of any kind set out or alleged against *Belford* upon which any execution could have issued against him.

After argument by *Fisher* for plaintiffs in error, and by *Hale* for defendant in error,

The opinion of the court was delivered by

TOD, J.—There is no doubt of the power of the court below to permit the substitution of the amended narr. As clear it is, that though the defendants below might, if they thought fit, enter a new plea to the new declaration, and it would have been regular to have done so, yet they might elect to abide by their former plea of payment; and after a verdict, their going on to trial upon that plea must here be taken as conclusive proof that they did so elect. The slip in the name of *Christopher*, instead of *Christian*, cannot be assigned for error. The time to object to the variance was when the *fieri facias*, or the judgment was offered in evidence to the jury; yet the defect would probably then have been permitted to be cured at once by the amendment of the narr.

The main defect relied on is, the omission to aver the existence of any judgment against *Belford*. What the case would be upon demurrer for this cause need not be decided. Admitting it to be a defect, I take it to be cured by the plea of payment and by the verdict. A breach is alleged in the words of the condition. Besides here the sheriff has collected the money on *M. and C. Marks's* execution, and has it in his hands. Suppose then the very worst that is imagined in argument:—Suppose there is no judgment or an erroneous judgment, and that the execution will be set aside upon error; at whose expense will that be? Not the sheriff's. The writ of restitution must be executed upon *W. and C. Marks*, and the *fieri facias* is for ever a sufficient justification to the sheriff against *Belford*. At any rate, if the declaration is defective, the defect is removed by the verdict. *Brownfield v. The Commonwealth*, for the use of *Monro*, 13 *Serg. & Rawle*, 265. *Thompson v. Musser*, 1 *Dall.* 461. *Geyer v. Sailer*, 6 *Binn.* 24. *Lewis v. Ewing*, 3 *Serg. & Rawle*, 44, appear conclusive upon the case.

ROGERS, J.—I cannot concur with the affirmance of this judg-

(Beale and others v. The Commonwealth, for the use of W. and C. Marks.)

ment. The error alleged, is the want of an averment of a judgment; and this, I believe, has always been held in *Pennsylvania*, and in every other country which is governed by the principles of the common law, to be a fatal objection to a declaration.

A declaration must allege every circumstance necessary to the support of the action. 1 *Chitty*, 190, 185. The plaintiff must show himself entitled to the money, which can only be done by giving in evidence a judgment on which the *fiери facias* has been issued. This, it will be observed, is a suit brought against the surety of the sheriff, and before action can be sustained, it is particularly necessary that the title of the plaintiff to the money should be set forth. The surety is not a party to the former suit, and cannot, upon any principle, be supposed acquainted with the plaintiff's right. He is not called upon to answer the demand until the plaintiff has exhibited and clearly proved his claim to the money alleged to have been received by the sheriff. It is not for the sureties to disprove the right, (which would compel them to prove a negative,) but the *onus probandi* is, as it ought to be, thrown upon the plaintiff.

The *fiери facias*, without proof of the judgment, is not sufficient evidence, unless when the action is brought by the person against whom the writ of *fiери facias* issued; in which case proof of the judgment will not be necessary; for though a judgment may be inferred from the *fiери facias* as between the parties to the suit, yet it cannot be so inferred against a stranger. *Lake v. Billers*, 1 *Lord Ray*. 733. 5 *Burr*. 2632. 2 *Bl*. 1104.

I hold it to be an undeniable position, that that which is the *sine qua non* of the recovery must in a special declaration, such as this, be positively and particularly averred.

This point does not depend upon general reasoning. It has already at an early day, been judicially examined and decided. *Jones v. Pope*, 1 *Saund*. 34.

That was the case of an action of debt for an escape, and *Saunders* took the exception that the plaintiff had only shown that he had sued a writ of execution, but had not shown that he had recovered any judgment as he ought: that the defendant might have pleaded *nul tiel record* to the judgment, if the plaintiff had set it out; but by this declaration, the defendant is ousted of such a plea; and for this, he cited Dr. *Drury's* case, 8 *Rep*. 142. And suppose, continued *Saunders*, the judgment had afterwards and before the bringing of this action been reversed, the action would be gone. 8 *Rep*. 142.

To this, I add, if the judgment in this case had been averred and proved, it might have appeared that satisfaction had been entered on the record.

These considerations acquire great weight from the circumstance, that the surety was no party, nor cognizant of the proceedings which are the foundation of this action.

(Beale and others v. The Commonwealth, for the use of W. and C. Marks.)

In addition to the authority of *Saunders*, I find, upon a careful search, that all the approved precedents, without an exception, set out a judgment. This, with reason, has always been considered as the best evidence of the law. *Precedents of Declarations*, 278. 8 *Wentw.* 460, 482. 5 *Wentw.* 226, 250. 2 *Chitty*, 350. *Harris's Entries*, 433, 435, 436. *Plead. Ass.*

In a suit against the sheriff for an escape on mesne process, it is necessary to allege the debt. *Plead. Ass.* 41. For an escape on a *ca. sa.* the judgment is averred. *Plead. Ass.* 48. The same averment must be made in an action against the sheriff for a false return to a *feri facias*. *Plead. Ass.* 47. So also in a suit against the coroner for not returning a *vend. exponas*. *Plead. Ass.* 49. *Precedents of Declarations*, 278. 2 *Chitty*, 350.

Upon the authority of the case in *Saunders*, the reason of the thing, and the uniform precedents, I hold it to be clear law, that the judgment must be averred, as well as found, to entitle the plaintiffs to recover.

I do not indeed understand it to be denied, that this would have been fatal on a general demurrer, nor is it disputed that the judgment must be shown on the trial. There was not a demurrer here, but the parties went to trial on the plea of payment and after verdict there was a motion in arrest of judgment, which was overruled.

It is alleged by the defendants in error, that if there be a defect in the declaration, it is cured by the plea of payment, with leave, &c. This would indeed make a new era in legal jurisprudence. The law has not been so considered heretofore, nor can it be, in my opinion, so held on principle. The plea of payment admits the truth of the averment in the plaintiffs' declaration, and nothing more. For this I refer generally to 6 *Binn.* 24. 8 *Serg. & Rawle*, 316. 11 *Serg. & Rawle*, 318, and to the uniform course of decisions by this court.

It has been further contended, that the defect is cured by the verdict under the statutes of jeofails, and the sixth section of the act of assembly of the 21st of *March*, 1806.

The principle is correctly and clearly stated in 3 *Bl. Com.* 395, and is decisive of the first branch of this objection: "If the thing omitted is essential to the action, or defence, it cannot be cured by a verdict."

The act of assembly provides, that in all cases where any suit has been brought in any court of record within this commonwealth, the same shall not be set aside for *informality*, if it appear that the process has issued in the name of the commonwealth, against the defendant, for monies owing or due, or for damages by trespass, or otherwise, as the case may be, that said process was served on the defendant by the proper officer and in due time.

This act of assembly has been uniformly held to extend merely to matters of form; it is, therefore, unnecessary to state what my

(Beale and others v. The Commonwealth, for the use of W. and C. Marks.) opinion would be, if the question were now, for the first time, to be settled by a solemn decision of this court.

In relation to this matter, I adhere to the rule of *stare decisis*.

I shall certainly not contend, but that the suggestion of breaches generally in the words of the condition, is sufficient to support the declaration, with this qualification, that the plaintiff at the same avers his title to the money. The objection here is, not that the suggestion of the breaches is too general, but that there is no averment of a judgment, or in other words, that the plaintiff shows no right to the money alleged to have been received by the sheriff on this *feri facias*. The reason a general suggestion of breaches is held to be sufficient is, that otherwise the declaration would, in the language of the books, tend to infiniteness.

It is said, that in an ejectment the plaintiff recovers by the strength of his own title, and this is equally true of every other action. The plaintiff must always show his right to the money he seeks to recover. It is sufficient for the defendant that the plaintiff shows no right.

If this defect be cured by verdict, it is difficult to conceive what default will not be. If we are to presume in this case that the judgment was shown to the jury, we shall, in all cases, be bound to presume that every thing was proved necessary to the plaintiff's recovery. The principle has been heretofore, that we can judicially notice only what has been particularly averred, or appears in some way on the record of the cause. 6 *Binn.* 24, 28. 10 *Serg. & Rawle*, 233.

I would not wish to be considered as regretting this decision, as perhaps it may be supported by resorting to first principles. But as it is in my opinion, contrary to the whole current of decisions in *Pennsylvania*, and the general opinion and practice of the profession and the courts, I repeat that I cannot concur in the affirmation of this judgment.

GIBSON, C. J., concurred with ROGERS, J.; but DUNCAN, J., agreeing with TOD, J., the judgment was affirmed, because the court was equally divided. HUSTON, J., took no part in the decision, having ruled the case below.

Judgment affirmed.

[SUNBURY, JUNE, 20, 1827.]

BANKS *against* The JUNIATA BANK of Pennsylvania.

IN ERROR.

The plaintiff is liable to the prothonotary for the price of an original writ, though charged to the plaintiff's attorney in the docket.

The prothonotary is entitled to demand the fees due in a suit conducted to judgment, though a *scire facias* thereon has issued, on which the proceedings are not terminated.

He is also entitled, where after a *scire facias*, execution has been taken out, and no return made for more than two years.

WRIT of error to the Court of Common Pleas of *Mifflin* county.

Ephraim Banks, the plaintiff in error, and defendant below, was sued by the *Juniata Bank of Pennsylvania* in this action of debt on single bill. The defendant below had been prothonotary of the Court of Common Pleas of *Mifflin* county, and pleaded a set-off of sundry sums claimed by him, as fees for his services as prothonotary, in sundry suits: in each of which the *Juniata Bank* was plaintiff. On trial in the Court of Common Pleas of *Mifflin* county, some of these claims of the defendant below were admitted in evidence; but the following items of set-off were rejected, and bills of exception taken thereupon.

1. The fee due for issuing an original writ to *April* term, 1821, against *Belford* and others. It was admitted that this fee was unpaid, but the defendant below had never charged the same in any book to the *Juniata Bank*. On the contrary he had, by an entry on the margin of the docket, charged the same to Mr. *Hale*, the attorney of the Bank. Mr. *Hale*, on the trial, denied his liability.

2. Fees, amounting to two dollars and fifty cents, for sundry services to the plaintiff below, in a suit against *Allen*, to *November* term, 1818, and judgment thereon. To revive this judgment, after the defendant below was out of office, to *November* term, 1821, a *scire facias* issued, to which the defendant, *Allen*, appeared, and pleaded payment, and no step had been taken in the cause by either party since.

3. Fees, amounting to three dollars and fifty cents, due on an action against *Reynolds*, brought to *August* term, 1818. Judgment in *March* 1820. *Scire facias* to *November* term, 1821, Judgment on the *scire facias*, and execution to *April* term, 1824. of this execution, no return had yet been made by the sheriff, nor did it appear that any return had been called for.

4 & 5. The fees due on issuing two original writs to *August* term, 1818, one, against *Elliot* and *Beale*, served, but no step in the cause since; the other against *Kennedy*, not served, but prosecuted by an *alias writ*, after defendant below was out of office. Judgment, and execution obtained. Land sold, and the proceeds

(Banks v. The Juniata Bank of Pennsylvania.)

of the sale applied exclusively to prior judgments. After argument by *Potter* and *Blanchard*, for the plaintiff in error, who cited *Lyon v. M^cManus*, 4 *Binn.* 169, 11 *Serg. & Rawle*, 248, and *Moore v. Porter*, 13 *Serg. & Rawle*, 100; and by *Benedict*, for the defendant in error, who also relied on *Lyon v. M^cManus*, 4 *Binn.* 169,

The opinion of the court was delivered by

Todd, J.—1. Error assigned.

It is not intended to give any opinion upon the question, whether by contract express or implied, the attorney in a cause may not become solely responsible to the prothonotary for the price of the original writ. But, without such contract, it is clear that though the attorney directs the writ, and though the prothonotary is not bound to give any credit for it unless he thinks proper, yet if he does give credit, that credit is presumed to be given exclusively to the plaintiff in the cause. The charge entered on the docket against the attorney, can make no difference in the case, though that entry might be evidence with other facts to help to establish a special contract. Even if the attorney was responsible, and clearly bound for the price of the writ, yet neither that responsibility by itself, nor any thing else of the kind short of actual payment or satisfaction, can exonerate the *Juniata Bank*, the principal debtor. Therefore, as under the case of *Lyon v. M^cManus*, 4 *Binn.* 169, it is conceded that no compulsory credit is to be given for the fee on an original writ, and as the law has not made the attorney liable in this case, and it does not appear that he has made himself so, we decide this point in favour of the plaintiff in error. The set-off was good, and ought to have gone in evidence to the jury. This decision disposes also of the 4th and 5th errors assigned.

2. The fees due in the case of *Allen*. The *scire facias*, we take to have been the commencement of a new suit, and the first action was ended, at least so far as to give the officer a right to demand his fees, and terminate the credit, under the rule established in the case of *Lyon v. M^cManus*.

3. The fees due in the case of *Reynolds*. It is argued, there is no insolvency shown here. There is none. Nor do we consider that under the facts of this case, any insolvency need be proved. An execution had issued, and no return made, or demanded, for more than two years. The presumption then is conclusive, that the defendant in that case, if not insolvent, has paid the debt and costs to the plaintiff below. The prothonotary has, most certainly, no right to interfere in a cause. He cannot prosecute to insolvency, nor issue an execution without orders, nor call for a return of it. The opinion of the court is, that the plaintiff in error has sustained all his exceptions; that judgment be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE 20, 1827.]

The JUNIATA BANK *against* HALE and another. *Casey*

The death of the drawer of a promissory note before it becomes due, and the taking out letters of administration upon his estate by the indorsers, and others, before the note arrived at maturity, do not dispense with the necessity of notice to the indorsers of non-payment by the drawer.

THIS cause was tried on the 19th of *April*, 1827, before the Chief Justice, at a Circuit Court for *Mifflin* county, and now came before this court, on an appeal from his decision in overruling a motion made by the defendants for a new trial.

It was an action of assumpsit, brought by the *Juniata* Bank against *Elias W. Hale* and *James Chriswell*, upon a promissory note for seven thousand six hundred dollars, drawn by *John Starrett* in favour of *E. W. Hale*, dated *November* 10th, 1816, payable six months after date. *Hale* was the first, and *Chriswell* the second indorser. The note was for the accommodation of the drawer, and discounted by the *Juniata* Bank. Before the day of payment arrived, the drawer died, and on the 2nd of *December*, 1816, letters of administration on his estate were granted to *Rebecca Starrett* his widow, *Robert Starrett* his brother, and to *Hale* and *Chriswell*, the defendants. On the 14th of *May*, 1817, the note was protested, but no notice of a demand on, or non-payment by the drawer, was given to the indorsers, or either of them.

The defendants proved that *John Starrett*, the drawer of the note, lived and died about twelve miles from *Lewistown*; that his widow continued to live there after his death; that *Robert Starrett* lived on the adjoining farm, and that both *Hale* and *Chriswell* lived in *Lewistown*, where the Bank was situated. They also proved, that *John Starrett* was the owner of a tract of land, a grist mill, saw mill, and a still house, and was doing in his lifetime a tolerably large business, and that he purchased in speculating times a tract of land in the Narrows, which in the year 1814, would have sold for a great deal of money.

The defendants, likewise, gave in evidence the record of an action brought in the Court of Common Pleas of *Mifflin* county, to *August* term, 1818, by the *Juniata* Bank, against the administrators of *John Starrett*, in which judgment was confessed by the defendants in the sum of three thousand seven hundred and eighty-five dollars and twenty-seven cents, "*de bonis non*, of the intestate, and not otherwise."

At the conclusion of the trial, the Chief Justice charged the jury as follows:

"Under the facts and circumstances given in evidence, it is the opinion of the court, that neither demand of payment, nor notice

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of non-payment is necessary. This direction is given for the purpose of bringing the point in contest, which is one exclusively of law, before the Supreme Court."

Alexander, for the appellants.—Notice was a condition of the contract, and could not be dispensed with. *Gibbs v. Cannon*, 9 *Serg. & Rawle*, 201. Even the death of the party, or notorious insolvency, does not render notice unnecessary. *Knowledge* is not notice, *Esdaile v. Somerville*, 11 *East*, 114, and inquiry whether damage has ensued, is altogether irrelevant. *Chitty on Bills*, 209, 212, 274 note. *Sneeds v. Utica Bank*, 20 *Johns*. 382. The promise of the indorser is conditional, and is incomplete for the purpose of sustaining a suit, until the condition is performed. 9 *Johns*. 121. *Berry v. Robinson*, 12 *Mass. R.* 91. *Chitty*, 199. *Murray v. King*, 7 *Eng. Com. Law Rep.* 57. 4 *Cox*, 163. 20 *Johns*. 150. 9 *Mass. R.* 205. 10 *Mass. R.* 52. Where the indorser knew the maker to be insolvent at the time of drawing the note, it was nevertheless held that notice must be given. *Farnum v. Fowle*, 12 *Mass. R.* 89. *Reed v. Commonwealth*, 11 *Serg. & Rawle*, 441. The want of notice was, in the present instance, actually very injurious to the indorsers. The land of the maker might have been made liable for this note, and in fact the profits would have paid it, and from want of notice that the defendants were held liable by the bank, the land has been placed beyond their reach. Notice is necessary in order to charge the drawer, though the maker be absent from the county, and the same principle applies to the case of death. 14 *Johns*. 177. *McKinney v. Crawford*, 8 *Serg. & Rawle*, 353. The case of *Bond v. Farnham*, is the only one which militates against the doctrine now contended for; but that case is distinguishable from the present, because there was there a particular assignment in favour of the indorser. Here the assignment which the law makes of the assets, is for the benefit of the creditors generally. It is like an assignment in a case of bankruptcy, and there notice is indisputably necessary. *Smith v. The Bank of Washington*, 5 *Serg. & Rawle*, 321.

Benedict and Blythe, contra.—The indorsers having been administrators, united in their persons the character both of maker and indorser, and therefore did not require, and indeed could not have the notice usually required, in order to charge the indorser of a promissory note. They held the funds of the maker, and bound themselves faithfully to administer those funds. They were, therefore, pledged to pay this very debt. The object of notice is to secure the indorser, and whenever it would not have that effect, it is considered as waived. Actual prejudice from want of notice need not, it is true, be shown; if there be a possibility of injury, the indorser is entitled to notice; but where no injury can possibly arise, as in the present case, notice would be nugatory, and is therefore, not required. It is upon this principle that notice is not necessary where the drawer is a partner of the firm on which the bill

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is drawn. Here the indorsers having become the representatives of the drawer, stand in the situation he would have occupied, and do not require notice of that which, from their situation, it was impossible to avoid knowing. *Chitty on Bills*, 211. *Barton v. Baker*, 1 *Serg. & Rawle*, 334. *Gowan v. Jackson*, 20 *Johns.* 176. 12 *Mass. R.* 86, 403. 13 *Mass. R.* 556. 4 *Maule & Selw.* 226.

The opinion of the court was delivered by

DUNCAN, J.—This was an action against the defendants, on a negotiable note, dated the 10th of *November*, 1816, for six hundred dollars, in which *Starrett* was the drawer, *E. W. Hale* the payee, *Hale* the first indorser and *Chriswell* the second. It was a note for the accommodation of the drawer, and *Hale* declares in the memorandum subjoined to it, that it was for the use of the drawer. It was payable in six months, and was discounted by the *Juniata Bank*. The drawer died before the day of payment; and, on the 2d of *December*, 1816, letters of administration issued on his effects to *Rebecca*, his widow, *Robert*, his brother, and *Hale* and *Chriswell*.

On the 14th of *May*, 1817, the note was protested, but no notice of demand or non-payment was given to the indorsers, or either of them.

The *Juniata Bank* contended, that notice of non-payment was unnecessary, inasmuch as the indorsers were two of the administrators, who, in their character of administrators, must have had knowledge of the non-payment of the note, and had all the estate of the drawer in their hands to secure themselves.

The indorsers insist, that if knowledge was proved on them, of the fact of non-payment, still they were entitled to notice from the *Juniata Bank*, the holder of the note, of the intention of the bank to call on them. And *Chriswell*, who is joined in the action under the act of assembly, insists, further, that he should have had notice; for although the note might not have been paid by the drawer, who died before it became due, still it might have been paid by the first indorser, and the notice of the non-payment was an important matter to him. It is further insisted by the defendants, that, so far from the bank giving notice of an intention to look to them for payment, in 1818 they obtained a judgment by confession from the administrators, a special judgment *de bonis intestati*, and not otherwise; and that they delayed to proceed on this judgment, and did not call on the indorsers until this action was brought, which was lacking a few days of six years, when the statute of limitations would have barred the recovery.

On the trial of the cause before the Chief Justice at the late Circuit Court, for the purpose of having the question settled in this court, which is admitted to be new in species, he instructed the jury, that neither the demand of payment nor notice of non-payment was necessary, and it is from this decision the defendants appealed: and

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on this opinion it is now only necessary for this court to decide. From the view they have taken of this subject, if the court did not decide on the general doctrine of the necessity of notice of non-payment from the holders of the note, the circumstances of the situation in which *Chriswell*, the second indorser, stood, and the judgment against the administrators, and the long delay in bringing the action, were matters worthy of serious consideration; but they have judged it most advisable to decide upon the general principle.

What is the nature of the engagement of the indorser? It is founded on the law merchant, and is governed by its principles: his undertaking is only to pay in case the maker does not pay. The indorser takes it on the condition that he will first apply to the maker; and, in an action by the indorsee against the indorser, the declaration must aver that on the note becoming due, the demand was made of the drawer, and that he refused to pay, of which the defendant had notice. It is an essential part of the plaintiff's case, and even a verdict would not cure the omission. This was decided in the Court of Errors and Appeals, and the judgment of the Supreme Court reversed. *Miles v. O'Hara*. And though the declaration alleged that the drawer of the bill became liable by the custom of merchants, this is not sufficient, because the law merchant is not a matter of fact, but of law, and the want of notice is the very gist of the action; for it is that which raises the implied promise. *McKinney v. Crawford*, 8 Serg. & Rawle, 353.

That knowledge of non-payment is not notice, is very clear; for the notice must come from the holder himself, or some one who is a party; for the notice must assert that the holder intends to stand on his legal rights, and to resort to the indorser for payment; and therefore, where the drawer had notice before the bill was due that the acceptor had failed, and gave another person money to pay the bill, and the holder neglected to give notice of its dishonour, it was held that the drawer was discharged. *Nicholson v. Gouthit*, 2 Hen. Bl. 612. *Whitfield v. Savage*, 2 Bos. & Pull. 277. *Esdaile v. Sowerby*, 11 East, 114, 117. And where a few days before the bill became due, the acceptor informed the drawer that he must take it up, and gave him part of the money to assist him in so doing, and the latter promised to take up the bill accordingly, it was held the latter might nevertheless set up, as a defence, that the bill was not duly presented for payment, and that he had not regular notice of the dishonour. *Baker v. Birch*, 3 Campb. 107. The notice must come from one who can give the drawer or indorser his immediate remedy on the bill, and not from a stranger; otherwise it is merely an historical fact: it must be legal notice, otherwise the party is discharged from the liability he contracted by indorsing it. 2 Cowp. 177. *Chitty on Bills*, 292. The reason given, in *Ex parte Buisley*, 7 Ves., jr., 597, is very satisfactory; for the ground of discharging the drawee is, that the drawer gave credit to some other person liable, as between him and the drawer.

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Notice from any other person than the holder, that the note is not paid, is not notice that the holder does not give credit to a third person. This is very strongly put by ASHHURST and BULLER, Justices, in *Tindall v. Brown*, 1 Term Rep. 167. According to ASHHURST, "notice means something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but that the holder does not intend to give credit to such maker: the party ought to know whether the holder intends to give credit to the maker, or to resort to him." And, by BULLER, J., it was said, "The notice ought to purport, that the holder looks to the party for payment, and a notice from another party cannot be sufficient: it must come from the holder." And this doctrine of BULLER has been acted upon in many cases there, as Lord ELDON observed in *Baizeley's* case. Now, here these indorsers ought to have had notice from the *Juniata* Bank; for that would be notice that they did not mean to resort to the estate on which, with others, they had administered, but to them in the character of indorsers; whereas, by not giving notice, they had a right to conclude the bank intended to look to the drawer. And, according to ASHHURST's opinion, they had a right to know from the holder, the *Juniata* Bank, that they intended not to give credit to the estate of *John Starrett*, but to look to them personally as indorsers.

The argument, that the indorsers received no injury from the want of notice does not now hold. Whatever vacillation prevailed in courts for a time, it is now settled, that the insolvency of the drawer of a note does not dispense with the necessity of demand, and notice of non-payment. Between the parties to the notice the rule is inflexible, and it is not open to the inquiry whether notice could have availed the indorser. The holder has no right to speculate and judge what may be the interest of the parties: his duty is a plain one—to give notice; and, if that rule is dispensed with, it opens a door for endless litigation, and perplexing inquiries. Death, bankruptcy, notorious insolvency, or the drawer's being in prison, constitute no excuse either in law or equity. *Gibbs v. Cannon*, 9 Serg. & Rawle, 201. Notice to one of several partners, who are joint indorsers, is notice to all; and, if one of the drawers of the bill be also an acceptor, and there is no fraud in the transaction, no notice, in fact, is necessary to the others. Neither is notice necessary to a party who by his conduct dispensed with it, as, by engaging to call on the holder, and ascertain whether the acceptor has not paid the bill. *Chitty on Bills*, (Carey & Lea's Ed.) 297. So, if the drawer of a bill promises to pay, this is a waiver of the objection of the want of notice, where the party knew all the facts and the legal consequences. But it has been recently held, that though the drawer of a bill may impliedly waive his right of defence, founded on the laches of the holder,

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yet an indorser can only do so by an express waiver. *Borradale v. Lowe*, 4 *Taunt.* 93, 96, 97. *Brown v. M'Dermot*, 5 *Esp. Rep.* 265. And there is, in all those cases of want of notice, a material and essential difference between the drawer of a bill and the indorser; for, if the drawer of a bill had no effects in the hands of the drawee or acceptor, and the bill is drawn for the accommodation of such drawer, he is *prima facie* not entitled to notice of the dishonour of the bill, nor can he object in such case. He, being the real debtor, acquires no right of action against the acceptor by paying the bill, and suffers no injury from want of notice of non-acceptance or non-payment, (12 *East*, 171,) and therefore the laches of the holder affords him no defence. 4 *Taunt.* 733. But it is no excuse for not giving notice to the indorser of a bill, that the acceptor had no effects. *Peake's Rep.* 202. "That circumstance," said Lord KENYON, "will not avail the plaintiff. The rule extends only to actions brought against the drawer: the indorser is, in all cases, entitled to notice." See *Chitty*, 259, 295.

It has been attempted to bring this within the principle of *Bond v. Farnham*, 5 *Mass. R.* 170, and *Barton v. Baker*, 1 *Serg. & Rawle*, 334; but those cases were decided on very different grounds. In the first, Chief Justice PARSONS says, "The opinion was founded on this, that if the indorser, representing himself liable for the payment of particular indorsements, receives a security to meet them, he shall not afterwards insist on a fruitless demand upon the maker, or a useless notice to himself, to avoid payment of demands, which on receiving security he has undertaken to pay." In the latter, the late Chief Justice put it on the ground, that it was not unreasonable to suppose that the defendant took upon himself the payment of the indorsed notes, and on no other ground could it be held that the notice of non-payment was not necessary.

But here the indorsers had no security, beyond any other simple contract condition of *John Starrett*; they obtained no advantage beyond strangers to the administration: for by the death of the intestate, his goods and lands were seized by act of law, by a kind of statute execution in the hands of his administrators, just as in the case of a commission of bankruptcy, and to be discharged in a prescribed order; in which the administrator cannot prefer himself or retain his own debt, as he could by the laws of *England*. The lands, the fund here for the payment of debts, do not come into the possession of the administrator: he has no right of entry, and can bring no ejectment; the possession descends to the heir. The executor or administrator have, by virtue of their office, in no case a right to the possession of the deceased's lands. As I do not find the case of an indorser becoming an administrator to the drawer, in any decision among the books of authority, to form an exception to the necessity of giving notice to the drawer, and as there is no reason why it should, I am not for relaxing one jot

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further than it has been done, this wholesome and convenient rule. Indeed, we find judges regretting that it had ever been departed from in any case.

The Chief Justice, who decided the case in this court, for the purpose of bringing this new question before the court, joins in the opinion of the other members of the court, that the indorsers not having received notice of non-payment, are not liable on the indorsement, and that the appeal be sustained.

The rule of demand and notice is one of universal obligation. I would not extend the exceptions further than to the cases which have been expressly decided. Policy and the convenience of the public, require a rigid adherence to the rule; for, otherwise, exception would creep in after exception, and leave the law, which ought to be certain, open to speculation and to doubt.

Judgment reversed.

[SUNBURY, JUNE 20, 1827.]

STACKPOLE and others *against* GLASSFORD.

An execution upon a judgment by default, on a mortgage for the performance of a collateral act, without a previous inquisition, though irregular, is not absolutely void.

A mortgage is not discharged by a sale under a younger judgment, where the purchaser agrees to take subject to the mortgage.

Whether there was such an agreement, the jury ought to decide.

On the return of the record of this ejectment from the court of Common Pleas of *Mifflin* county, the material facts appeared to be these:

To *November* Term, 1807, the administrators of *James Stackpole* issued a *scire facias* upon a mortgage against the administrators of *John Allen*. At *August* Term, 1811, the following entry was made upon the record: *Judgment for sum due. By the court.* To *January* Term, 1816, a *scire facias post annum et diem* issued, to which the sheriff returned *tarde venit*. An *alias scire facias*, returnable to *April* Term, 1816, then issued, which recited, that the administrators of *James Stackpole* had recovered two hundred and fifty-five pounds ten shillings, ten and a-half pence, and commanded them to show cause why execution should not be issued. To this *scire facias* the defendants pleaded payment with leave, &c.; and, on the 21st of *February*, 1820, judgment was entered for plaintiffs. A *levari facias* issued to *April* Term, 1820, which commanded the sheriff to levy on three hundred acres of land for the payment of "a certain debt of two hundred ———, lawful money, with the lawful interest thereon from the ———,

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as also twenty-eight dollars and seventy-two cents, like money, for costs, which said sum of ——— with interest and costs aforesaid, the administrators of *James Stackpole*, deceased, lately, &c., recovered, &c.” An *alias levari facias* issued to *August* Term, 1820, which commanded the sheriff to levy on three hundred acres, more or less, &c., a certain debt of two hundred ———, lawful money, &c., with interest from the 7th of *January*, 1797, as also thirty-two dollars and eighty-seven cents, like money, for costs, &c., which said sum of two hundred and fifty pounds, with the interest, costs, &c., the said administrators of *James Stackpole* recovered against the administrators of *John Allen*, by the default of the said *John Allen*’s administrators, in not paying the sum of two hundred and fifty pounds, &c., at the day and time when, &c.

On this *levari facias*, the property for which the present ejectment was brought, was sold on the 6th of *October*, 1820. The Sheriff of *Mifflin* county executed and acknowledged a deed for the same, to *Thomas Stackpole*, the plaintiff, for the use of the heirs of *James Stackpole*, deceased. This was the case on the part of the plaintiff.

The defendant gave in evidence a judgment, entered of *April* Term, 1806, in the Court of Common Pleas of *Mifflin* county, in which *James Vaw*, for the use of *James Reed*, was plaintiff, and the administrators of *John Allen*, defendants, on which a *fieri facias* and *venditioni exponas* were issued; and on the 8th of *January*, 1809, the land was sold for two hundred and nine dollars and fifty cents to *William Laird*: to whom the sheriff, on the 20th of *May*, 1814, executed a deed. *William Laird* had previously, namely, on the 23rd of *January*, 1813, entered into articles of agreement with *William Mering* for the sale of the land, and on the 18th of *February*, 1813, *Laird*, together with *Adam Holliday*, gave to *Mering* a bond conditioned to indemnify and save him harmless against a mortgage given by *John Allen*, in his lifetime, to a certain *James Stackpole*, binding the lands and property of the said *Allen*, in the said mortgage mentioned, to secure a title to to the said *James Stackpole*, for a two hundred acre tract of land in *Wayne* township and county aforesaid, in the name of *James Holmes*; which property, mentioned and described in the mortgage aforesaid, the said *William Laird* purchased at the sheriff’s sale as the property of the said *John Allen*, subject to the mortgage aforesaid, and has since sold to the said *William Mering*.

Whether the defendant, *Glassford*, claimed the land under a settlement, as to which some evidence was given, or under *William Mering*, did not appear from the record.

The President of the Court of Common Pleas charged the jury in the following manner:

“The plaintiffs have not proceeded regularly nor legally. There is no judgment for a sum certain. The judgment is for the sum due. What is that? The price of patenting two hundred

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acres of land. It may be fourteen dollars, or it may exceed four hundred dollars. Whatever it was, for so much they had a lien. No suit was brought until both the parties to the mortgage were dead. Then it laid until the land was sold, and long after, until the money was paid and the deed made. In 1816, a *scire facias* issues, and a judgment is entered, without a trial, although there was a plea and issue: as this judgment was not for a specified sum, there was no right to take out execution. They seem to have had a right to some money, and in the negligent way in which the cause is brought before us, it is entirely uncertain whether they were paid or not. It appears the amount of the first sale went to prior liens, or rather, was ordered to be so appropriated. No prior lien is shown, except this mortgage. If it was the only existing prior lien, it would seem they ought to have got their money from that fund, and are paid in contemplation of law, at least so far as the amount of that sale; and they have not pretended to show whether it was or was not equal to their demand. We are inclined to the opinion, that the plaintiffs, on their own showing, could not recover, even against *Allen's* heirs, as defendants.

“If this is the land sold to *Laird*, he has it clear of the mortgage. The mortgagee ought to have received his money. He purchased in 1809. Four years afterwards he sold to *Mering* and received his money, and covenanted to defend against this mortgage. About a month afterwards he gave an indemnifying bond to *Mering*, and in that bond recited that he had bought subject to the mortgage. But the levy was not subject to the mortgage, nor the return of sale, nor the deed. The defendant bought from a purchaser at sheriff's sale. The levy was absolute—the sale absolute—the deed absolute. In taking a security from the vendor against a rumoured incumbrance, a month after the conveyance and payment of the money, the bond recites that it was purchased at the sheriff's sale, subject to the mortgage. This appears not to have been true in fact. No doubt it was supposed to have been true in law. Will this statement, if made as a conclusion of law, make it so? We think not—not even if it was stated by parol at the time of sale, that the purchaser would by law take subject to the mortgage. We protest against a sale by the law being any thing but what the law makes it; against a title by record being any thing but what the record shows it to be.”

This opinion was excepted to by the plaintiffs' counsel, and in this court, *Hale*, for the plaintiffs in error, contended,

1. That the judgment was of such a character as to sustain the execution. It has never been reversed or set aside, which is sufficient. It is objectionable, perhaps, in point of regularity, but that cannot be taken advantage of collaterally. Independently of this title, the plaintiffs may recover upon the mortgage itself.

2. As a general provision of the law, a sale on a judgment does not divest an older mortgage; but whatever may be the difference

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of opinion on that point, a doubt has never been entertained where the purchaser agrees, as in this instance, to take subject to the mortgage.

Fisher, contra.

1. The plaintiffs did not pretend that they were entitled to recover on the mortgage, but relied altogether on the sheriff's deed. That deed was founded on a judgment for unliquidated damages; and by the words of the act of assembly, an inquisition was a necessary preliminary to the execution. 2 *Binn.* 42, 86, 92. 1 *Str.* 309. *Tid*, 936. 11 *Serg. & Rawle*, 223.

2. The mortgage was discharged by a sheriff's sale on a younger judgment, and the mortgagee ought to have come in and taken his money. 7 *Serg. & Rawle*, 290. 11 *Serg. & Rawle*, 223. There was no evidence that *Laird* agreed to purchase subject to the mortgage. The opinion of the judge was merely hypothetical, as to this part of the case.

The opinion of the court was delivered by

ROGERS, J.—I agree with the learned judge who tried this cause, that the plaintiffs have neither proceeded regularly, nor legally. The judgment upon the *scire facias*, (*sur mortgage*) does not ascertain the amount claimed by the plaintiffs being merely a judgment for the sum due. The *scire facias quare executio non*, recites that two hundred and fifty-five pounds, ten shillings, and ten and a-half pence have been recovered, and demands execution for that sum. The defendants, instead of pleading *nul tiel record*, plead payment with leave, &c., on which there is a judgment for the plaintiffs, which in strictness would be a judgment, that they have execution for the sum averred to have been recovered. The *levari facias* is clearly irregular, being for two hundred ———, without stating whether it be pounds, shillings, dollars or cents. The *alias levari* is to levy on three hundred acres of land, for the non-payment of two hundred and fifty pounds. On these proceedings, the land in dispute was sold, and without any complaint from the administrators of *Allen*, or from any other person. *Thomas Stackpole* became the purchaser at the sheriff's sale, for the use of the heirs of *James Stuckpole*, deceased. The court on motion, would have had no difficulty in setting aside these proceedings for irregularity, and the judgment would have been reversed by the Supreme Court in error. These irregularities, however, do not render the proceedings so absolutely void, as to vest no title in the purchaser at sheriff's sale. On the contrary, they are available against the present defendant until reversed, and are not to be examined in this collateral suit. *Henry Glassford* seeks to take advantage of a defect, with which he has no concern; for it is a matter of no consequence to him to whom the money arising from the sheriff's sale belongs, whether to the mortgagee, or the judgment creditors of *Allen*. The erroneous process stands good until

(Stackpole and others v. Glassford.)

the party avoids it by error, and no person can bring a writ of error, but he who is party or privy to the record, and competent to release it. *Carth.* 148. 1 *Wils.* 255. *Cro. E.* 165. *Cro. J.* 288. 2 *Saund.* 46, note b.

As I understand this cause, the plaintiffs allege, that when the land was sold by the sheriff on the judgment, it was sold subject to the mortgage, and that there was an express understanding to that effect. That this was a condition of the sale, and so understood by the sheriff and the purchaser. If this were the *fact*, which it was for the jury to decide, it would be against equity, that the defendant should retain the land without paying the amount actually due on the mortgage. It forms a part of the purchase money; as much so as if *Laird* had paid an amount sufficient to cover the mortgage, with the additional sum of two hundred and nine dollars and fifty cents, paid for the land. He takes upon himself, the payment of the amount due in addition to the sum paid.

As it seems that this material fact was withdrawn by the judge from the jury, this is error.

If the jury should find that there was such an agreement, the defendant can relieve himself, by paying or tendering on the trial the amount really due on the mortgage.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JULY 2, 1827.]

SANNER *against* COOK'S Administrators.

IN ERROR.

If a defendant, on appealing from the judgment of a justice, calls new witnesses, though it be to establish the same facts he relied on at the former trial, he loses his costs on the appeal, though successful. He must, in such case, pay the costs accrued before the justice.

ERROR to the Court of Common Pleas of *Northumberland* county.

Sanner, the plaintiff in error, sued *Cook* in debt before a justice of the peace. The justice gave judgment for the plaintiff. The defendant appealed, and on a reference to arbitrators, there was an award, not only reversing the judgment of the justice, but finding a balance due from the plaintiff to the defendant, *Cook*. It appeared that *Cook*, before the arbitrators, made the same defence which he had made before the justice, produced the same set-off, and relied upon the same facts; but he brought forward, and examined witnesses whom he had not produced before the jus-

(Sanner v. Cook's Administrators.)

tice. *Sanner* thereupon moved the court below, for a rule to enter judgment on the award, *without costs*, relying upon the fourth section of the act of the 20th of *March*, 1810, that, on the reversal or abatement of the amount of the judgment of the justice, the defendant appealing shall be allowed his costs, &c., only in case he produces no evidence before the court other than that which he exhibited before the justice. This rule was denied by the court below, and that denial was now assigned for error.

After argument by *Greenough* for the plaintiff in error, and *S. Hepburn* for the defendant, the opinion of the court was given by

TOD, J.—We take the rule to be, that the appellee is exonerated from the payment of costs to the successful party, not only by the production against him of new facts on the second trial, but also by the production of new evidence of the same facts. The intent of the act of assembly appears to have been, by this forfeiture of costs, to prevent vexatious appeals, in cases in which a party otherwise, by withholding the strength of his evidence, would be sure to obtain, on appeal, a reduction of the amount of the judgment against him. Clearly, a party may rely upon the same facts, and yet make out a new case altogether, by producing new witnesses, or new documents. It is not every small or accidental variance of proof, that will, in a case like this, discharge the appellee from costs. But the general rule is, that if the appellant adduces new evidence to strengthen the grounds he before relied on, he loses his right to costs under this act of assembly. Nor can an inquiry be entered into whether the proof on the second trial is stronger than on the first. The court can have no means of deciding what effect the fresh evidence has had upon the minds of the arbitrators, or of the jury. Another point in this cause, is decided by the case of *Kimble v. Saunders*, 10 *Serg. & Rawle*, 193. The plaintiff in error recovers his costs accrued before the justice. Each party must pay his own costs on the appeal.

Judgment reversed, and to be entered for the defendant below, without costs accrued since the appeal.

[SUNBURY, JULY 2, 1827.]

SATTERLEE *against* MATTHEWSON.

IN ERROR.

The act of assembly of the 8th of *April*, 1826, respecting the relation of landlord and tenant between *Connecticut* settlers and *Pennsylvania* claimants, is constitutional, and operates on a case which had been previously tried in the Court of Common Pleas, and sent back by the Supreme Court for a new trial, so as to change the principle of law then decided by the Supreme Court, that the defendant, though a tenant, might contest the title of his landlord.

THIS was a writ of error to the Court of Common Pleas of *Bradford* county, in an ejectment brought by *Elizabeth Matthewson*, the plaintiff below and defendant in error, against *Elisha Satterlee*, (*John F. Satterlee* being afterwards made co-defendant as landlord,) defendant below, for two hundred and seven acres of land in *Athens* township, *Bradford* county, tried at a special court for that county, held before FRANKS, President of the judicial district, and one of the associate judges of *Bradford* county, in which a verdict and judgment were rendered for the plaintiff below.

The plaintiff produced a patent dated the 19th of *February*, 1813, to herself as executrix, in trust for the use of the heirs of *Elisha Matthewson*, deceased, founded on a warrant, dated 10th of *January*, 1812, calling for an improvement in 1785, and survey thereon.

The defendants set up title in *John F. Satterlee*, derived as follows: Application 3d of *April*, 1769, in the name of *John Stoner*, and survey, *September* 23d, 1773. *Stoner* conveyed on the 5th of *April*, 1775, to *Matthias Slough*, who conveyed on the 5th of *April*, 1780, to *John Wharton*. On the 17th of *April*, 1781, a patent issued to *Wharton*, who on the 1st of *April*, 1812, conveyed to *John F. Satterlee*.

To rebut this title, it appeared on the plaintiff's showing, that in 1786, Colonel *Franklin* and *Elisha Matthewson*, and *Elisha Satterlee*, with others, laid out the township of *Athens*, under the *Connecticut* title, which had never been recognized by the laws of *Pennsylvania*, as one of the seventeen townships. *Matthewson* and *Satterlee* were brothers-in-law, and each obtained in that township lands adjoining on the opposite sides of the river *Susquehannah*, which they worked in partnership till 1790, when they agreed that *Matthewson* should take possession of and cultivate *Satterlee's* lands on the west side, and that *Satterlee* should take in the same manner *Matthewson's* on the east side, and that either might put an end to the tenancy at the end of any year. The land in dispute was that taken by *Satterlee* as tenant. In 1805, *Matthewson* died, devising all his real estate to the plaintiff, for the benefit of his family; and the plaintiff demanded possession, but *Satterlee*

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refused to deliver it up: and in 1812 and 1813, she applied for and obtained the warrant, survey, and patent before mentioned.

The defendant then produced in evidence the record of an ejectment brought for this land in the court of Common Pleas of *Bradford* county, to *November* Term, 1813, by *John F. Satterlee* against *Elisha Satterlee*, in which on the 10th of *September*, 1813, a rule of reference was entered, award in favour of the plaintiff on the 22d of *October* following, and on the 13th of *November* a *habere facias possessionem* issued, which was returned executed. On the same record it appeared that Mrs. *Matthewson*, by her attorney, joined herself as co-defendant; took out a rule of reference, and obtained a report on the 1st of *November*, 1813, for her part; but the court on the 13th, struck these proceedings of Mrs. *Matthewson* from the docket. On the 1st of *April*, 1816, *John F. Satterlee* made a lease of the premises to *Elisha Satterlee*, during the lives of him and his wife, at a rent of one dollar *per annum*. It appeared also that *Elisha Satterlee* made the contract with *Wharton* for the land, and paid for it, and the son's name was put in the deed at his request.

Thus far this case appeared as it had on the former trial, when after a verdict for the plaintiff in the court below, on the ground that the defendant was a tenant, and could not contest the title of his landlord, the judgment was reversed in *June*, 1825, by the Supreme Court, who held that this rule of law was not applicable in this case, because the title of Mrs. *Matthewson*, the landlord, was a *Connecticut* title, existing in violation of the laws of *Pennsylvania*, and the relation of landlord did not exist after the time of the plaintiff's acquiring a title under *Pennsylvania*, the 10th of *January*, 1812. (13 *Serg. & Rawle*, 133.)

An act of assembly passed on the 8th of *April*, 1826, made the following enactment: "That the relation of landlord and tenant shall exist, and be held as fully and effectually between *Connecticut* settlers and *Pennsylvania* claimants, as between other citizens of this commonwealth, on the trial of any cause now pending, or hereafter to be brought within this commonwealth, any law or usage to the contrary notwithstanding."

The court below, after stating the case, charged the jury as follows:

The defendants contend, that by the laws of *Pennsylvania*, the plaintiff's testator could not lease the land; and if he did, the rights of landlord do not extend to him, inasmuch as he was a claimant under a *Connecticut* title.

With respect to this point, we lay down the law to be, that if the tenancy did and does exist, the mere circumstance of claiming the title under a *Connecticut* right, will not deprive the lessor of the rights of landlord. The act of assembly passed 8th of *April*, 1826, enacts:—

"That the relation of landlord and tenant shall exist and be held as fully and effectually, between *Connecticut* settlers and *Penn-*

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sylvania claimants, as between other citizens of this commonwealth on the trial of any cause now pending or hereafter to be brought within this commonwealth, any law or usage to the contrary notwithstanding."

It is a general principle of law founded on wise policy, that the tenant shall not controvert the title of his landlord, and prevent his recovery of the possession by showing that the title of the landlord is defective. Among the exceptions to this general rule, the Supreme Court of *Pennsylvania* have decided, that when the landlord claims, (as the plaintiff claimed on the former trial of this cause,) under a *Connecticut* title, the case should form one of the excepted cases. The legislature have thought proper to enact the above recited law, and by it we are bound. And if the plaintiff in all other respects shall be found entitled to a recovery, the mere claiming through a *Connecticut* title would not now deprive her of her right to such recovery. But the defendants further contend that the relation of landlord and tenant at the death of *Matthewson* ceased to exist, if it ever did exist, and that by the laws of *Pennsylvania*, the relation of landlord and tenant could not be continued to his devisee or vest in his executors. This is not the law: if there was a tenancy, if *Satterlee* held the lands as the tenant of *Matthewson*, the death of *Matthewson* did not alter the relation in which *Satterlee* stood; he would continue to hold as the tenant of the plaintiff.

The plaintiff alleges that the purchase by *John F. Satterlee* was fraudulent, that his father *Elisha Satterlee* was in fact the real purchaser, and that the conveyance made to the son, and the suit instituted, and judgment and eviction, and the lease were all fraudulent, and for the sole purpose of depriving her of her rights to the possession.

A tenant who is evicted without any collusion or fraud on his part, ceases to stand in the relation of tenant, and he may take a new lease from the person evicting him. But he cannot resist his landlord's recovery by virtue of a title adverse to the landlord, acquired during his lease. Nor can a tenant, giving up possession fraudulently, and taking a lease from the party to the fraud, deprive the landlord of his right to recover; in law, he is still a tenant.

Much evidence has been given as to the nature of this transaction, (reads the testimony.) If the jury should be satisfied from the evidence that the transaction was a *bona fide* one, and that *John F. Satterlee* was the actual purchaser, then the defendants can set up the eviction as a bar to the plaintiff's recovery as landlord. But if, on the other hand, the jury should be satisfied that the transaction was collusive, and that *Elisha Satterlee* was in fact the purchaser, and the name of his son put in the deed instead of his own, for the fraudulent purpose of *destroying the rights of the plaintiff as landlord*, then the action of ejectment would be in

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fact by himself against himself; and the judgment in it, the eviction and the lease would all be a fraud in law, so far as it went to affect the plaintiff's right as landlord.

But fraud is not to be presumed—it must be proved; and the jury ought to be well satisfied that the transaction was fraudulent before they consider it as such. If you shall be of opinion that there is not sufficient evidence to support the allegation of fraud, then the old title produced by the defendants must prevail, provided the survey was made on the ground, and the defendants will be entitled to your verdict in their favour.

Errors were now assigned in the opinion of the court below; namely, that they erred in charging the jury:

1. That by the laws of *Pennsylvania*, the plaintiff's testator could lease the land, and that the rights of landlord do extend to him, although he claimed under a *Connecticut* title.

2. That the act of 8th of *April*, 1826, gives a right of recovery, and does away the force of the law as declared by the Supreme Court in this case.

3. That by the will of *Elisha Matthewson*, the relation of landlord and tenant was continued to the plaintiff.

4. In applying the several laws of landlord and tenant to this case, and charging that if the purchase by *John F. Satterlee*, was for *Elisha Satterlee*, the purchase, ejectment, judgment, eviction, and the lease are a fraud in law, as far as they go to affect the plaintiff's right as landlord.

5. General errors.

The opinion of the court was delivered by

HUSTON, J.—As the events related in this cause, and the course it has passed through, are in some respects unusual, I shall state the facts and the decision in some measure at large, and take a view of the whole contest; for such a statement will be necessary to come to a right conclusion.

The charter under which the colony of *Connecticut* claimed, and that under which *William Penn* and his heirs claimed *Pennsylvania*, interfered with each other about one degree of latitude through the whole of *Pennsylvania*, from east to west. Before the revolutionary war, settlers under the colony of *Connecticut* began to improve a part of this land, and seventeen townships were surveyed and in part inhabited under this title. Battles had been fought and blood shed. The attention of the two colonies, then become states, was turned to the war for independence, which required all the energies of both; and, during this war, the contest between the states was suspended. In 1782, the contest, as to the right of jurisdiction between the two states, was decided in favour of *Pennsylvania*. The articles of confederation required expressly a separate tribunal and trial, to decide the right of soil between those who had purchased under the different charters; and,

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to prevent misunderstanding, the commissioners, who decided the jurisdiction, expressly stated along with their decision, that they had not considered this latter question. After this, and not before, *Pennsylvania* assumed jurisdiction; and, the first act of the legislature, was one staying all suits brought by persons claiming under *Pennsylvania*, in the courts of that state. This was soon repealed. I pass over the laws and the history of the next four years willingly, though they abound in facts curious and instructive, to those attending to minute, judicial and legislative history.

In 1787, was enacted, "The act for ascertaining and confirming to certain persons, called *Connecticut* claimants, the lands by them claimed within the county of *Luzerne*, and for other purposes therein mentioned." This act was suspended by a law of 1788, and repealed by another of 1790.

The next remarkable event, was the trial of the case of *Vanhorn's Lessee v. Dorrance*, in the Circuit Court of the *United States*, of which I shall only say at present, that it is not easy to determine whether the misapprehension of the facts in the cause, or the misapplication of the law to those facts, is most conspicuous. It led to the passage of the act of the 11th of *April*, 1795, entitled, "An act to prevent *intrusions* on lands within the counties of *Northampton*, *Northumberland*, and *Luzerne*," and several supplements, by which it was provided, by section 1st, "That if any person, *after the passage of that act*, should intrude or settle on any lands, &c., he should be liable to imprisonment, not exceeding one year, and a fine of two hundred dollars." Section 2d, imposed a fine not less than five hundred, nor exceeding one thousand dollars, "on every person who shall combine or conspire for the purpose of surveying, possessing, or settling on any land within, &c., under any half share, right, &c., or for the purpose of laying out townships, &c."

The following sections contained certain provisions for carrying this law into effect.

The 16th of *February*, 1801, a supplement was passed, in the first section of which it was provided, that the proof of a person being actually in possession of lands within those counties, should be *prima facie* evidence to convict him under the first section of the preceding act, "unless he prove that he entered upon, took possession of, or settled on said tract *before the passage of the act of the 11th of April*, 1795." The words of the prior act, only apply to entry *after the passing of the act*, and the supplement, though a severe one, *expressly exempts those who proved that they entered upon, took possession of, or settled before the passage of the act of 1795*, and these facts are to be kept in mind throughout this cause.

It is true, that notwithstanding the decision in *Vanhorn's Lessee v. Dorrance*, many persons were coming into this state under the *Connecticut* title. A company, called the *Susquehanna*

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Company, claimed a large body of those lands. They had before this decision, nay, before the adjudication of 1782, sold many thousand acres; and, after both those decisions, the purchasers from this company were selling at a very reduced price, to whoever would purchase; and hundreds of honest, industrious men in the eastern states purchased what they supposed good titles, and never knew or heard otherwise, until they had removed into this state to take possession. Newspapers and reports of judicial decisions, were not so extensively circulated as at present. Although, perhaps, all those who held under the *Susquehannah* Company knew of these decisions, it is certain they found and imposed on hundreds who never heard of them. To prevent this imposition, and to prevent the consequences of it to the individuals imposed on, and to this state, the above act of 1795 was passed, and it had the effect: the supplement of 1801, was obtained by false representations to the legislature. I will add, that only one person, and he not defended, was ever subjected to the pains and penalties of either of those laws.

I now go back a year or two. In the winter of 1796-7, the *Susquehannah* Company held its last meeting; *dissolved itself, and as a company agreed to close its books and make no more transfers of lands.* During the same winter, the inhabitants who had settled, as before stated, petitioned the legislature of this state; and again in 1797-8; and the succeeding session enacted what is called the compromising act, under which and its supplements, this contest became extinct. In 1800, however, the legislature suspended the act of limitation of suits for possession of real property, in all cases where title is, or has been, claimed under the *Susquehannah* Company, or in any way under the state of *Connecticut*. The contest ceased. The land-holders under *Pennsylvania*, sent agents to all parts of the disputed country. The settlers, almost to a man, purchased the *Pennsylvania* title: if any refused, or the parties could not agree on terms, suits were brought and the land recovered from the settler. It is not the least remarkable fact in this business, that the indictments under the intrusion laws, were tried before juries composed entirely of *Connecticut* claimants, or those who had been so. The ejectments were tried before juries of the same description. In the first cases, where the necessary facts were proved, they found special verdicts of guilty, if the acts of assembly were constitutional; in the ejectments they found for the plaintiff, if he made out a title, and there was not one instance of a verdict against evidence, or against the law, as laid down by a *Pennsylvania* judge.

In *January* 1814, (see 6 *Penn. Laws*, 122,) the legislature repealed the whole list of intrusion laws, acts to protect territorial limits, &c.; and, in 1813, repealed the law, suspending, where lands were claimed under *Connecticut*, the act of limitations. And then these people became entitled to the benefit of all

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the laws of this state, and all the privileges of free men, and were subject to no other penalties, fines, forfeitures, &c. than other citizens. With these facts before us, let us proceed to examine the case trying. About 1784 or 1785, *Elisha Satterlee*, the defendant, and *Elisha Matthewson*, who was married to the defendant's sister, went to the land in question, and each of them took possession, as is believed and was not denied, under the *Susquehannah* Company, of lands west of, and lands east of the *Susquehannah*. They worked in partnership on the lands, on both sides of the river until 1790, when it was agreed that *Matthewson*, who had a house on the west side, should occupy the lands of both on that side, and be the tenant of *Satterlee* for his part; and *Satterlee* moved on the lands on the east side, on precisely the same terms: let it be understood they were not tenants in common, but each had a lot on each side of the river, and it was expressly agreed, that either might put an end to the tenancy at the end of any year; and, in that case, each was to be put in possession of his own land. In 1805, *Matthewson* died, having devised the possession of all his real estate to his widow during life, and after her death to his children equally. *Satterlee*, repeatedly, after *Matthewson's* death, acknowledged the original bargain, and that he was a tenant of *Matthewson's* part; but, he wished to buy it—he wished to give other lands for it, &c. In short, it was good land, and he had set his heart on it. But his sister would only sell during her life, and her children were minors. In 1810 she built a house on a part of the tract, and put a tenant in it; but her brother would not give possession of the part he had in cultivation. In 1811 she made application, and took in *January* 7th, 1812, a warrant in her name, in trust for her children, and got a survey and a patent; she stated an improvement made by her husband in 1785, and paid instalments to the state on the purchase money from that date.

After his sister's warrant, survey; and return, *Elisha Satterlee* purchased a *Pennsylvania* title, which he alleged covered the land in question; but he directed the deed to be made to his son, *J. F. Satterlee*, and in 1813 an ejectment was instituted in the name of the son against the father, as was expressly proved, in pursuance of a plan of the father's, to release him from the situation of tenant to his sister. By a law then in existence, but since repealed, you might enter a rule of reference on the same day you took out your writ, and by proper diligence might, in some cases, obtain a report which had the effect of a judgment, before the return day of the writ. This process was, by means of the father waving all objection as to time and notice, so applied, as that the son not only had judgment, but a writ of *habere facias possessionem*, before the return of the writ. The present Chief Justice of this court, then presided in the Common Pleas in that district: an ignorant attorney for Mrs. *Matthewson*, had attempted to prevent all this; but had proceeded so illegally, and was going on so out of all rule,

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that she could not, and did not get herself on the record as landlady and co-defendant. And this proceeding was suffered to stand, because the proceeding bore such evidence of management, that she was expressly told if she could prove fraud, she would not be affected. *J. F. Satterlee* then gave to his father a lease for life.

Mrs. *Matthewson* immediately instituted this ejectment. *J. F. Satterlee*, in 1817, procured himself to be entered co-defendant, and his father being dead, is now sole defendant.

The cause was tried and brought to this court by writ of error, and the opinion of the court below reversed two years ago. See 13 *Serg. & Rawle*, 133. The judge had instructed the jury, that if *Elisha Satterlee* was found to be the real purchaser who actually bought and paid for the land, and if they found the ejectment brought by the son, *J. F. Satterlee*, in whose name the conveyance was taken, was actually instituted by the father, though in his son's name, against himself, and that the suit was all trick and so conducted, on purpose, as to prevent his sister from interfering or being heard, that he was still her tenant as much as if no such proceeding had ever taken place; but, if the son was the real purchaser, and the suit instituted and conducted *bona fide*, and the lease to the father during his life for a dollar a year *bona fide*, that then *Elisha Satterlee* having been evicted by due course of law, might take a lease from him who recovered, and, in that case, the relation of landlord and tenant, between him and his sister, was at an end: the cause must be decided on the respective titles of the parties. But, if they found him still a tenant, he could not set up against his landlord an adverse title purchased during his tenancy; but he must restore the possession to his landlord, and might then institute a suit on the title he had purchased; and, if it was the best, recover from his former landlord. The verdict and judgment were for Mrs. *Matthewson*, and against the tenant.

On the argument of this cause in the Supreme Court, a point was made, which never had been thought of before in *Pennsylvania*; viz. that the relation of landlord and tenant could not exist between persons holding under a *Connecticut* title; and the Supreme Court, in 1825, held in this place, reversed the judgment of the Common Pleas, and awarded a *venire de novo*. The avowed principle on which this decision is given is, that it had been the policy of *Pennsylvania*, and the object of her laws, to cut up the title under *Connecticut* by the roots. Admit it;—and does not the repeal of all those laws containing no ordinary list of statutory crime and severe punishment show, that in the opinion of that branch of our government, within whose sphere it peculiarly lay, either the object was attained, or the means were improper?

The principle on which this cause was decided, when carried through, extended very widely: if all the ties of relationship arising from affinity of blood, or from common or statute law, were dissolved by this unhappy contest, Mrs. *Matthewson* coming in

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under her husband's will, and the guardian and trustee of her children under that will, and who in that capacity had got possession, had only to hunt up some old *Pennsylvania* title, buy it for nothing, and it at once released her from all the ties of nature, of law, and of religion; and disinherited them, and made the lands her own. Many persons had found the *Pennsylvania* owner and purchased from him at a low rate, with the intention to buy out *Connecticut* settlers, and had done so, and at once entered on a fine farm, highly improved; and even if he had given a mortgage to the *Connecticut* settlers, the principle of this decision avoided it. Executors might buy the title to land of which they were in possession under the will; guardians, the lands held in right of their wards, &c., &c. This is not an imaginary result from this decision; at the very next court, we had here the case of a mortgagor, who insisted the principle of this decision had cancelled his mortgage, and left him in possession of the very finest estate in that country, and that neither bond, mortgage, law, or common justice bound him to pay for it. This court, however, held, that he was bound. To be sure, they considered it as a purchase of the improvements, and not the title: see *Tracy v. Overton*, 14 *Serg. & Rawle*, 311, which in effect reverses the decision of this cause in 1825.

At the next session of the legislature after the decision of this cause, a law was passed, enacting "That the relation of landlord and tenant shall exist, and be held as fully and effectually between *Connecticut* settlers, and between *Connecticut* settlers and *Pennsylvania* claimants, as between other citizens of this commonwealth, on the trial of any cause *now pending, or hereafter to be brought* within this commonwealth, any law or usage to the contrary notwithstanding."

This cause came on for trial a second time after the passage of the above act. The judge stated the decision of the Supreme Court above mentioned, and proceeded to read the above act, and said, by it we are bound; and if the plaintiff, in all other respects, shall be entitled to a recovery, the mere fact of claiming through a *Connecticut* title, will not now deprive her of the right to such recovery. In all other respects his charge corresponded with a former one in this cause, which received the sanction of this court, and which therefore I shall not here notice.

The only exceptions here relied on by the defendant's counsel are, that the act of assembly is unconstitutional, and void; and, which is only the same thing in another shape, that *E. Matthewson* by dying, and his widow and children by continuing in possession, violated one of the laws now repealed, and that therefore the plaintiff cannot recover.

1. I shall not discuss the question, as to the power of the legislature generally, to pass such acts as seem to them to be required, to promote the peace and welfare of the community, or to

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establish the rights of the citizens. Admitting the position, that a law may be void, as contrary to the constitution of this state, or the *United States*, let us inquire whether this one is so. To define the precise limits would be no easy task. All laws limiting the time of bringing suits, all insolvent laws, all laws instituting new tribunals, or enlarging or restraining the jurisdiction of courts, all laws admitting the inhabitants of a city or county, or township, to be witnesses, all laws creating disabilities, or removing those which existed; in fact, all laws modifying rights, or suits, or remedies, have by some one or other, been objected to as unconstitutional. They impair contracts is the allegation. That the expression impairing contracts, did not mean the same thing as impairing the force, effect, or remedy on a contract, is long known, and settled. Did the act under consideration impair any contract, or modify it or alter the remedy on it, or even change the tribunal, or vary the evidence, from what they were, when the several contracts were made? Counsel may in their zeal, determine to view a corner of a cause, and nothing but a corner; a court ought to look at the whole of it. The allegations here are, that this act of assembly impaired the contract between *J. Wharton* and *Satterlee*, and the lease from *J. Satterlee* and his father.

It was conceded at the former trial, and now, that in general a man who came in as tenant must deliver possession to his landlord, and cannot controvert his title in an ejectment by the landlord to recover that possession; and it is admitted that, except for the particular reason adopted by the Supreme Court, the law was applicable to this case. It has not been contended that the defendant was within any exception heretofore recognized. It is admitted, the exemption from the effect of this general rule of law was never, I do not say thought of, but certainly never applied to any preceding case, between Connecticut claimants. It was not adopted, because the old rule was unwise or inconvenient, or unjust: the sole reason for it is, to cut up the Connecticut title by the roots. Much has been said and written on the subject of retrospective laws; some of it wisely, and some of it at least, not wisely applied. To take it at the best, a retrospective decision of a court, in the application of a new and unheard of rule, by which to determine past contracts, is at least as objectionable as a legislative provision. And, if this rule is adopted, not from its justice, but a real or supposed policy, it does not mend the matter. Perhaps a regulation on this principle, is more immediately within the scope of legislative, than of judicial power.

But suppose the legislature have pursued a certain course, and enacted sundry laws expressly on the ground of general policy, and being convinced the end was obtained, or that the means were improper, should repeal all its laws on the subject, and that evidence existed or was even suspected to exist, that the evil was springing up anew, and by law, certain disabilities were imposed,

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on a part of the community; in a year it is completely discovered that the law was passed on information totally unfounded; may not the law be repealed, and suitors try their causes, on the law as it stood when they made their contracts, precisely as if the intermediate law had never been enacted? Judges of the *Supreme Court* in *Pennsylvania* heretofore were confined almost the whole year to five particular spots. They had as little opportunity of information, as to the existing state of things in remote corners of the state, as any three men in the state; and from the very nature of things, their minds being constantly engaged in their professional business, they were as likely to trust implicitly to the first informant, as any other men. We must, however, suppose them open to conviction, and if they were either satisfied that the rule was a bad one, or that the grounds as to matter of fact, on which it was adopted, were mistaken, have they not the power to rescind it, on a second trial of the same cause, and would this be impairing contracts? A court have no more power to impair contracts than a legislature. *In the case put, the party would have no right to complain; he got a temporary advantage from his own representation of the matter: when the facts and the reasoning on these facts are reviewed, he is left where he began, his cause is to be decided on the old rules and laws in force, when his contracts were made.*

If a court could then take off at one term a disability adopted at a preceding, may not the legislature do so? *The power of the legislature is in this matter, at least, as extensive as that of the court, and it is superior to that of the court, who are bound by the laws enacted on this subject, at least, as much as on any other.*

In this case, the legislature have not affected any right; they have not prescribed a rule in any particular case; they have taken away a disability which they thought ought never to have been imposed, and which did not exist, when any of the contracts were made. I have left all of those contracts to be decided on the laws and regulations in force when they were made.

It is said, that if *Elisha Satterlee* is now turned out, as having been a tenant, his possession will be considered the possession of his landlord, and if he brings an ejectment on his *Pennsylvania* title, he will be bound by the act of limitations. Be it so. He will not be the first man who, by perverseness, craft, and fraud, has lost a good title; though, by the by, *I do not mean to say, he had a good title, or any title to this land; for, on a careful and full investigation, I am satisfied his Pennsylvania title lay on a tract near this, but not on this.* But still, if he loses on this ground, it is not the fault of the legislature: his title, if lost in this way, was gone in 1815; the judicial disability of the plaintiff was not known until 1825, and removed in 1826, *but we must take it now there never was a disability: that the law is founded on*

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a more full investigation of facts, and more careful consideration to the real policy of the state, than the decision. There would not have been, in a legislature of one hundred and thirty-five, more than four or five who ever had any connexion with this title, or could be suspected of any partiality towards those whose fathers once claimed under it. In every point of view in which I can consider it, the law is not only free from objection, but is a just and wise enactment.

But another point has been raised and argued in this cause, in this court, though never presented to the Court of Common Pleas, which, though not material here, ought not to be passed over in silence.

In 1801, it was discovered that a deed conveying a title under *Connecticut*, as was supposed, for it did not mention whence the title was derived, was recorded in *Lycoming* county. The alarm was sounded, and a law was passed in 1802, That no conveyance to be made of any lands, within, &c., shall be good and effectual to pass any right, title, &c., unless it refer to and recite the substance of a warrant and survey, or patent derived from the late proprietaries or this state; and if any judge or justice shall take the acknowledgment or proof of the execution of any deed, which does not describe the lands sold as aforesaid, or any recorder of deeds shall record, &c., each of them shall forfeit two hundred dollars, and the recorder lose his office; and, further, any person who after the 15th of *June* next, shall bargain, sell, or convey, or by any means obtain, or get, or procure any pretended right or title, or make or take any promise, contract, grant, or covenant, to have any right or title of any person or persons in or to any lands, tenements, or hereditaments within this state, under the said pretended title, &c., shall forfeit the sum of two hundred dollars; and such promise, contract, or covenant, is hereby declared to be utterly void.

I lived near the scene of action, and had some part in the prosecutions, or rather the defence of those prosecuted under the acts; and for a short time there was some show of zeal against these people, and counsel not a few were employed against them; but during all that, it was supposed those who settled prior to any of the laws against intrusion were safe from those laws: more especially as the words of the law expressly subjected only those who should thereafter settle, intrude, &c.; and it did not then occur to any human being, that a widow and children when they returned from burying the husband and father of the family to the house in which they had resided, nay in which they were born, were each of them guilty of a crime for which each of them must pay two hundred dollars, and suffer a year's imprisonment. But fifteen years after the law has been repealed, and twenty-two since the husband of *E. Matthewson* and father of her children, the real plaintiff, is dead, this court is gravely asked to decide that they were so liable; not

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for the purpose of indicting them, but of in effect confiscating their lands.

As the law about selling mentioned conveyances, acknowledgments, and recording, terms never applied to wills, it was not then supposed that a man who devised his real and personal estate to his wife and children, subjected them and each of them to a penalty of two hundred dollars! There appears to have been an intention to guard against conveyances in trust, and agreements to convey, or bonds conditioned to be void on conveyance; but the law relates to the living and not to the dead: he who conveyed, and he to whom the conveyance was made, are each subjected to the same forfeiture of two hundred dollars. No small display of profound learning has been exhibited in showing us the extensive meaning of the words convey, covenant, promise, contract, and it has been insisted a will is or may be comprised under all, or some one of these words. What a court would do, how far it would strain the meaning of words to make good an estate likely to be lost, or to prevent a forfeiture, I will not say; but it is not part of the principles of our law to strain and extend penal laws beyond their literal meaning, at least not beyond the supposed intent of the lawgiver; and it was never before attempted, nor I hope never again will be, to induce a court to go back, so long after a law has been repealed, to construe a law contrary to its obvious meaning, so as to inflict a fine and imprisonment on a dead man, and each of his infant children. I feel indignant that such an attempt should be made: it means more than meets the eye; it is intended to affect the estate of every man who died in that purchase, from its first settlement till the repeal of the law. But I leave it; the construction contended for is against the letter, the spirit, and intention of the law, as well as the general principle that all prosecutions, and all fines, forfeitures, &c., under a penal law, cease with its repeal.

There is one other matter in the opinion delivered in this cause not necessary to be considered in this case, but which I will just mention. It is said the plaintiff's title commenced at the date of her warrant, and cannot be carried back to the commencement of the *Connecticut* improvements under which she originally claimed.

I do not intend to give any opinion on this point, but to suggest that it is of immense importance. I have not consulted the other judges, but I would observe, these people are permitted, nay encouraged, to take out warrants; that by law they are bound to prove the date of their improvement, even though it was made under a claim from *Connecticut*; that they must pay interest on the purchase money from the date of the improvement, which in most cases trebles the sum to the state, and in the new purchase was eighty pounds per one hundred acres then, ten pounds now; that the statute of limitations runs during the time they had only a *Connecticut* title, as well and as fast as after they get one

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from *Pennsylvania*; that the state and the laws have forgotten there ever was such a title; it is only heard of in courts when a man wishes a release from the ties which hold society together, and the feelings which make life worth enduring; for no man or woman now claims or pretends to claim lands under it, unless so far as subsequent laws have legalized it.

DUNCAN, J.—The property in dispute is said to be of great value. The principle involved in the inquiry, is of immense importance, as it relates to the rights of individuals, said to be violated by special legislation, and the court is requested to give their opinion as to the constitutionality of a law of the state, by the counsel of the plaintiff in error, to enable them to take the record to the Supreme Court for final decision, on the ground of the act being unconstitutional.

To understand the question, it is necessary to state what were the rights of the parties, plaintiff and defendant, when the action was brought, and when the judgment of the Court of Common Pleas was reversed, and the cause sent back for trial; and, having shown how they then stood, our inquiry is extended to two questions: did the act of 1826 apply to this case? And, if it did, is it constitutional?

Both parties claimed under office rights from *Pennsylvania*. The plaintiff, by warrant dated the 10th of *January*, 1812, and patent of the 19th of *February*, 1813, dating back the settlement of *Elisha Matthewson* to 1785, and they are in trust to *Elizabeth*, the plaintiff, his widow, and the other devisees of *Elisha*. The defendants, on a location of the 3d of *April*, 1769, in the name of *John Stoner*, whose right became vested in *Joseph Wharton*, and patented to him on the 17th of *August*, 1785; who, on the 1st of *April*, 1812, conveyed to *John F. Satterlee*, made co-defendant as the landlord of *Elisha Satterlee*.

In 1791 or 1792, *Elisha Satterlee* and *Elisha Matthewson* being brothers-in-law, and claiming under *Connecticut*, came to some agreement, by which *Matthewson* was to cultivate certain lots of *Satterlee*, and *Satterlee* certain lots of *Matthewson*, including this land. This arrangement we must suppose to be but temporary, and not a permanent exchange, and consider it as a lease from *Matthewson* to *Satterlee*. After the death of *Matthewson* in 1805, *Elisha Satterlee* claimed to hold the possession, not as tenant of *Matthewson*, but under the pretence of exchange of property.

The matter thus rested, until this dispute between the plaintiff and *Elisha Satterlee*; he retaining the possession, but disclaiming to hold as tenant. In 1813, *J. F. Satterlee* brought an ejectment against *Elisha Satterlee* his father, in which Mrs. *Matthewson* applied to the court to be made co-defendant, as the landlord of *Elisha Satterlee*. Her application was rejected, we presume

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on the legal ground that the court, as the law then stood, could not admit on the record any person claiming as landlord on the *Connecticut* right.

In the same year, a report of arbitrators under the compulsory arbitration act, was filed in favour of the plaintiff, and judgment thereon, and a *habere facias possessionem* issued in 1814, to which the sheriff returned "executed." In 1816, *Elisha Satterlee* took a lease from *John F. Satterlee*—Rent one dollar a year, during the joint lives of himself and wife. In 1817 the present action was brought, a trial was afterwards had, and judgment for the plaintiff: this was removed by writ of error into this court, and in June, 1825, the judgment was reversed in this court, and a new trial awarded. The question agitated in the Supreme Court by *Matthewson*, was, that even granting *Satterlee's* to be the elder, and the better title under *Pennsylvania*, yet he was estopped by the lease of 1791, under the *Connecticut* claim, from now contesting *Matthewson's Pennsylvania* title; having come into possession as tenant, he must under every circumstance, and at all times surrender up his possession to his landlord: while the plaintiff in error contended that this rule could not be applied to this case, because the relation of landlord and tenant never could exist between persons claiming under *Connecticut*, and in hostility to the rights of *Pennsylvania*. The late Chief Justice, than whom no man better knew the state of this controversy between *Connecticut* and *Pennsylvania*, from the rise of the controversy to its termination, and the several acts of assembly protecting the state and its citizens from *Connecticut* intrusion, and quieting the certificated districts to the *Connecticut* intruders, and the surrender of their unjust pretences, and taking rights under *Pennsylvania*, under certain forms and conditions, (this land did not fall within the certificated districts, and whatever rights these parties had, must be derived, and flow from the laws of *Pennsylvania*,) gave the opinion of all the members of the court, that "*the relation of landlord and tenant did not exist between the plaintiff, nor either of the defendants, after John F. Satterlee had obtained the Pennsylvania title.*" 13 *Serg. & Rawle*, 133. The reasons of the decision are conveyed in the simple, clear and perspicuous manner, which distinguished all the judgments of that great and excellent man, and able, and upright magistrate. Within a few months after this decision, in the next session of the legislature, the act of the 1st of April, 1826, passed, which we are now to consider. It provides, that the relation of landlord and tenant shall exist, and be held as fully and effectually between *Connecticut settlers and Pennsylvania claimants*, as well as other citizens of the commonwealth, *on the trial of any cause pending*, or hereafter to be brought, "*any law or usage to the contrary notwithstanding.*" The act does not assume the form of a declaratory act, or one of explanation, but operates retrospectively on the vested right of

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freehold: making that law which was not law when *J. F. Satterlee* acquired his title; for the provision supposes that it was not the law, and was directly contrary the existing laws. One must be deaf, dumb, and blind, not to discern that the drawer of the bill had an eye to this very case, for there was no other suit pending; and, that it was a usurpation of judicial power by the legislature, a reversal of the judgment of the supreme judicial tribunal, and setting up the reversed judgment of the Court of Common Pleas, cannot reasonably be doubted. Not that the legislature so intended. Had this consequence been perceived, had they so understood the effect of this short bill, respect for that body forbids me to believe that it ever would have passed. The bill, most probably, passed in silence, and without debate. There was no notice given to the plaintiffs in error of this application to reverse the judgment of the Supreme Court; they had no opportunity of being heard by their counsel, whatever might have been the opportunity of the adversary. But, however apparent the intent may be to provide for this very case, still if any other possible meaning can be put on it, if it is *not provided for in express terms*, in words and letters, it ought not to be held to include this case. It is the duty of the court not so to hold it: from respect to the legislature, we are to presume that they did not intend to do a thing so unjust, as to deprive a man of his freehold, without a trial by jury, without the judgment of his peers, and against the law of the land, and to decide the cause in their own way, when it had been decided by those to whom the constitution had assigned the duty in another, any law or usage to the contrary notwithstanding. If the legislature intended to have reversed the judgment of the Supreme Court, and set up the judgment of the Court of Common Pleas, they should have so said. This sentiment was expressed by the present Chief Justice in his cogent argument in *Bedford v. Shilling*. The *English* decisions, where the parliament boasts of its omnipotence, as well as the decisions in the *American* courts, where the legislature is limited in the exercise of the power, clearly prove this to be the construction in all retrospective acts, even when they are constitutional. But the act does not apply to this case, because there was no dispute between *Connecticut* settlers and *Pennsylvania* claimants: both parties claimed under *Pennsylvania* rights, *ab origine* under *Pennsylvania*; the plaintiff under a settlement according to the laws, a *bona fide* personal resident settlement, followed up by a warrant founded on such settlement, and such settlement alone; *Satterlee* under office right of 1769, consummated by patent in 1781. Besides, the relation of landlord and tenant under *Connecticut* rights, was abandoned in 1812, when both parties at the same instant of time, put off the rags of *Connecticut* claim, and put on the garb of *Pennsylvania* title; the only title acknowledged by the law. The Court of Common Pleas decided in the ejectment by *John F. Satterlee* against *Elisha Sat-*

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terlee, that Mrs. *Matthewson* could not be received as landlord, because the law did not recognize her relationship; it would then have been unlawful in a *Pennsylvania* court to receive her, and the judgment in the ejectment stands unreversed. I will hereafter consider the hypothesis of the judge who tried the cause, that the *Satterlees*, father and son, committed a fraud on *Matthewson*, in acquiring the *Pennsylvania* title, and that the judgment might be averred against on this trial as collusive, and a fraud in fact and in law, on the *Matthewson* right.

I might, in the opinion of some, with prudence stop here, and avoid the constitutional question; but as the judgment of the other members of the court is, that the act does include this case, and is constitutional, and as the opinion is called for by the plaintiffs in error, for the purpose of revisal in the highest court, it appears to me that it would be a desertion of duty to withhold my opinion, which is, that the act in question so construed, would be a direct and palpable violation of the constitution of this state, and of the *United States*. I am too much indisposed to go into an extensive range of reasoning on this subject, and this is the more unnecessary, as I have lately trespassed too much on the public time in *Eakin v. Raub*, 12 *Serg. & Rawle*, 353. I will therefore content myself with succinctly stating the reasons for this opinion.

1st. Law is a rule of civil conduct, which never can be brought to bear upon that which occurred before the rule was promulgated, (I will hereafter show the exception to this) for that would be prescribing a rule for that which had happened, contrary to that before prescribed.

2d. It is a law for the decision of a case, where facts have happened and events taken place, on which a perfect right has vested; and therefore it is unconstitutional to take away from a citizen a right so vested, which he was in the full enjoyment of, and to the possession of which no obstacle existed by the present law of the land.

3d. It is a law impairing the obligation of contracts, a contract made with government; for *John F. Satterlee* held a title by patent from the state; he acquired a right to this tract of land, being a part of the public domains of the state, by contract; for grants of lands made by the state to individuals, are contracts within the very words of the constitution of the *United States*, from impairing the obligation to which the several states are prohibited. 6 *Cranch*, *Peck's case*. *Dartmouth College v. Woodward*, 4 *Wheaton*, 69. The patent under the act of 1785, establishing the land-office in this state, was an absolute, unconditional and irrevocable grant.

4th. Here, *John F. Satterlee*, for the purpose of the argument, had a right to this property, the exclusive, and perfect right and possession which could not be taken from him, and vested in *Mat-*

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thewson, for that is the effect given by the construction to this act. *Calder and Wife v. Bull and Wife*, 3 Dall. 386, and *Vanhorn v. Dorrance*. A complete title to these lands was vested in *John F. Satterlee*; he had the *jus duplicatum*, or *droit droit*, and to this double right the actual possession was annexed, *juris et seisinæ conjunctio*. The act strips him of this right of property, right of possession, and actual possession, rights acquired by the present laws. In *Green v. Biddle*, 8 Wheat. 75, where a *Kentucky* statute as to payment for improvement was held unconstitutional, Judge WASHINGTON thus strongly expressed himself: "Nothing can be more clear on principles of law and reason, than that a law which denies the owner of lands a remedy to recover the possession, when withheld by any person, however innocently he may have obtained the possession, or to recover the property, or which clogs the remedy for the recovery of such right, destroys the right. Where there is no remedy to recover it, there is no right." Now here it is not pretended, but that *John F. Satterlee*, until this act of 1826, possessed the most perfect right, and the undoubted and exclusive legal possession. There subsisted no relation of landlord and tenant, to interfere with his right or with his possession. No law obliged him in the character of tenant to surrender up the possession to *Matthewson*, not only the possession but the right itself; for if *Elisha Satterlee* continued up to 1817, when the action was brought, the tenant of *Matthewson*, not only the possession, but the patent is lost under the act of limitation. If *Elisha Satterlee*, in 1812, had the right to buy in the title of *Wharton*, and he was not, nor *John F. Satterlee*, the tenant of *Matthewson*, the statute would not run or be a bar till 1815; so that *Matthewson*, by lying dormant has acquired a title by means of *Satterlee's* possession since 1812 under the *Pennsylvania* right, which by no act she could have done, when the judgment was reversed in 1825; for it was then decided that if *Satterlee's Pennsylvania* title was better than *Matthewson's Pennsylvania* title, no relation of landlord and tenant, under the *Connecticut* settlement, compelled him to surrender his possession. As the law was then decided to be, *Satterlee* had the perfect right, which the legislature, as is contended, have thought just, and wise to deprive him of, and give it to *Matthewson* for his very merit of intruding, under pretence of a foreign title, into the soil of the state in disobedience of her positive laws. Yet, in the judgment of this court in 1825, this was not a merit for which he was to be rewarded, for the law said he should be punished: he had rendered the state no benefit, but did her great injury. But in one short year these laws are to be changed, and the language of the court with them; and the act of 1795, and all the laws against *Connecticut* intrusion are to be condemned in bulk as impolitic, oppressive, barbarous, and as fraudulent: such was not the opinion of this court in 1802, on *Franklin's* trial for intrusion, 4 Dall. 255; he was indicted, and convicted for

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conspiring with others to settle on certain lands within the limits of the county of *Luzerne* under a certain pretended title not derived from the authority of this commonwealth, "contrary to the form of the act of assembly &c.," the law of 1795 was decided by the court to be constitutional in all its relations; the judgment was arrested page 316, on the ground of misdirection of the *certiorari*, and so the criminal escaped. But the fashion of the present day is to hold up the *Connecticut* intruders as innocent, and oppressed men, and to abuse those who have purchased the *Pennsylvania* title, and load them in terms with epithets of traitors, rogues, and knaves, and to consider that which was a crime, and many laws punished with heavy fines, and long imprisonment at hard labour, the settlement, and holding by lease or otherwise under *Connecticut* right, as now a virtue, and the man a culprit who disclaims his unlawful intrusion, and becomes the rightful owner. It seems that though the tenant was punishable, yet still he owed lawful allegiance to his *Connecticut* landlord, which he never could cast off. It always stuck to him, though he returned to the allegiance of those to whom it was due. Fealty required of him to remain the villain of his *Connecticut* landlord, holding in subserviency to him, and good faith required of him, whenever called on, to give up the possession of that, to which he had acquired title. All this is to me utter confusion. Why is it that a tenant cannot set up a defect in his landlord's title, or show title in a third person during the continuance of his lease? It is because good faith, and the spirit of his contract bind him to restore the possession. He cannot change the nature of his possession; but I did not know before this act of 1826, that a lease by a *Connecticut* settler was a *bona fide* lease, and a binding contract: before this all laws, and all decisions in courts of justice had taught me a different doctrine. I had never until now understood that it was an act *mala fide*, for one who had leased from a *Connecticut* claimant to buy in a *Pennsylvania* title; and that it was derogatory, and contrary to good faith, having bought it, and paid for it, not to surrender it up. Even when a lease was fraudulently obtained, the tenant may show the fraud, and vacate the lease, and set up an outstanding title. 6 *Binney*, 47. So, if the landlord's title had expired: how much stronger is it, when the lease was void and the title to claim under it. The reason why a tenant shall not be permitted to contest the title of his landlord, is a liberal principle for the encouragement of justice and good faith. It certainly was a departure from the strict rules of law, and therefore must not be used as an instrument of fraud; it never prevails but when the lease was taken without fraud or illegal behaviour. This case fully proves, that when the lease is fraudulent, it is itself a crime; the tenant may set up another title, and is not bound to give up the possession. The lease was void, *ab initio*, an offence at common law, and declared to be strictly penal by positive laws. To claim under it, subjected the tenant to

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a very heavy punishment. If the argument of the defendants in error be good for any thing, it proves that if *Elisha Satterlee* had covenanted to pay a money rent, he must under this act, not only have given up the possession, but pay the arrears of rent for more than thirty-five years. Indeed, if *Elisha Satterlee* stood in the relation of a tenant to *Matthewson*, then this *Connecticut* settlement must be considered in the nature of a feudal tenure, and *Elisha Satterlee* to have taken the *juramentum fidelitatis*, or oath of fealty, and engaged to defend the *Connecticut* title, and going over to the enemies the *Pennsylvanians*, the land again reverts to his landlord, and these *Connecticut* settlements must be considered as having established a feudal connexion, and the settlers as an army of *feudatories* already enlisted, and prepared to muster; and that this connexion always subsisted, notwithstanding all the laws to the contrary, and must now by virtue of the act of 1826, be treated as a continuing valid connexion. This will be a proper place to consider the charge of the court, in another particular, which, if the act was constitutional and embraced this case, is radically erroneous, and proceeds on a mistaken principle, that is, the conclusion of the judge, that if the purchase of *John F. Satterlee* was fraudulent, being really a purchase in his name for the use of his father *Elisha*, and the suit, judgment, execution, and lease were fraudulent, for the purpose of depriving *Matthewson* of his right to the possession, that there was no end of the tenancy; and he left it to the jury to find the fraud from the circumstance of the purchase being for the use of the father, and therefore the subsequent proceedings were fraudulent, and instructed the jury that if they should be satisfied from that circumstance that the transaction was collusive, and that *Elisha* was the purchaser, and the name of the son put in the deed instead of the father, for the purpose of destroying the rights of the plaintiff as landlord, then it followed that the sale and conveyance to *John F. Satterlee*, the judgment, ejectment, and possession under it were all collusive on the rights of *Matthewson* as landlord. It is clear, that *Matthewson* had no right to be defrauded of; it could not be fraudulent on his rights as landlord, for landlord he was not. No one at that day could conjecture, that the legislature, forgetting all the laws that had been passed, vacating all these contracts and relations, should set them up twenty years after they had put them down, and should now make that an act of disloyalty in *Elisha Satterlee*, which was in obedience to her own laws; for the court make the very act of instituting a suit on a *Pennsylvania* title, a fraud on her laws. Neither *John F. Satterlee* nor *Elisha Satterlee* could aver this judgment to be fraudulent, they being parties to it: a mere stranger whose interest was not affected by it, could not. *Matthewson*, a third party, might, if it was a fraud on her rights; but the Court of Common Pleas, for reasons that all must applaud, refused to receive Mrs. *Matthewson* as landlord, would not suf-

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fer one claiming under *Connecticut* right to defend on that right; there was no privity of estate nor of contract between *Elisha Satterlee* and Mrs. *Matthewson*: finally, the court instructed the jury on this head, that if they believed there was no fraud in the conveyance to *John F. Satterlee*, nor in the proceedings on the ejectment, the defendant's elder title, if they found an actual survey, must obtain. Now this was error, unless we say that all the *Pennsylvania* laws, forbidding this intrusion under *Connecticut* claims, were a nullity, and unless we say that in 1812, it was unlawful in *John F. Satterlee*, or his father in his son's name, to buy in a *Pennsylvania* title, and unless we say that this judgment in ejectment was fraudulent and void, and acknowledge that *Matthewson* had then a right of which she was defrauded, was then the legal landlord, and now declare in this original action, that Mrs. *Matthewson* ought to have been received to defend in our courts of justice under a *Connecticut* right. If these principles be correct, as it is believed they are, then the act of 1826 did not embrace the case. There was no tenancy under *Connecticut*; if there ever had been, it was mutually dissolved by both parties abandoning that condemned and outlawed claim; and secondly, the judgment of ejectment put an end to it, and never could be overhauled by Mrs. *Matthewson*, in this original action the second time. It is likewise urged by the plaintiffs in error, that if the law was constitutional, still it does not legalize the devise to the plaintiff nor set up the will of *Elisha Matthewson*. I have not heard any answer to this objection, unless the act of 1826 is considered as a sovereign panacea, curing every thing that was forbidden, and setting up this *Connecticut* claim, as one that could be recovered, and continued in our courts of justice: certainly, when this will was null, it could not be read in a court of justice as evidence of any transfer of right, and certainly the act of 1826 does not make it so. The right would descend to the heirs at law, and the ejectment should have been in their names: the widow could not support an ejectment in her name, and the warrant is not in trust for the heirs, but for herself during life and then for the devisees. And the recovery in ejectment is of the possession to her. It is likewise insisted on by the plaintiffs in error, that this is an act of the legislature reversing the judgment of this court given in this very cause. Something was said about the mode and manner in which this law was obtained; of this, however, this court cannot take any notice, nor consider it in giving their judgment. Yet both parties agree here in their statement. One side accuses the other of impropriety in obtaining the law, while the other boldly advances that the act was made for this very case. Wo betide the people, if such a state of legislation could exist: for the honor of the profession of the law, I do not believe it now does, that a popular lawyer, a member with a popular client, can carry a cause in this way. And after being defeated in a court of justice, can in

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effect reverse the judgment of the highest judicial tribunal, by a legislative act without notice, without hearing and without a trial. This would shock the understanding of all men, and would be such an outrage on the rights of property as the people would not long endure. Let such usurpation of judicial power be encouraged, the strife would be to locate the lawyers in seats in the legislature, not for the purpose of making public laws, and improving the general system of the law, but improving the causes of their clients by new provisions, new rules of property, notwithstanding any existing laws or usage to the contrary; for it is to be observed, that this act does not assume the form of a declaratory act, or one of explanation, but operates retrospectively on the vested freehold rights, making that law which was not law when the estate vested in *John F. Satterlee*, and when the judgment of the Supreme Court was rendered in this cause. These observations are forced upon me by a sense of public duty, by no means implicating any man, or intending a reflection on an honourable profession, of which I am now the oldest member in *Pennsylvania*. It is not necessary now to decide whether the legislature of a state can revise or correct the errors of its courts of justice. Whatever respect may be due to legislative construction, I do not think that courts of justice are bound to adopt the same construction, contrary to their own judgment, in relation to present cases; nor am I at present disposed to say, that applications to, and decisions by the legislature, in a cause pending, is a bar to a party's rights.

The constitution intended to separate the judicial and legislative branches of government, and has provided, "that the courts of justice shall be open, and every man for an injury done to him, in his lands, goods, person, and reputation, shall have remedy by due course of law; and that trials by jury shall be as heretofore, and the right thereof remain inviolate." That this land was the estate of *John F. Satterlee*, as the holder of the perfect title, must be admitted, before the question under the constitution can be raised. Now I do not see how, consistently with the constitution, his property could be taken from him for public use without compensation, or how his land could be taken from him and vested in *Matthewson*. However meritorious some may think his opposition to the laws of *Pennsylvania* may have been, violating her territorial rights, I am clearly of opinion, that this act, if it affects the rights of *Satterlee*, is a divestment of his perfect title, and vests it in *Matthewson* by this new rule of property, which does not even disguise its real features, (the introduction of a new right,) whatever might have been the law under which it was acquired, any law or usage to the contrary notwithstanding. It is not a law merely taking away a disability from *Matthewson*, but it is a law taking away the property from *Satterlee*, imposing on him a disability by creating a new relation, which did not exist when he made his purchase and paid for his lands,—the disability

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of defending his possession by converting him into a tenant. It is not a law merely making that unlawful which was unlawful before, but it makes that unlawful which was lawful before, and deprives him of his defence. From my present illness, I have been obliged to draw up this opinion at intervals of exception from pain; and therefore it comes out in a very crude and desultory state. I conclude it with this illustration. Suppose a man marries his wife's daughter, this marriage would be incestuous and void; he dies intestate, seised of an estate which descends to his heirs, leaves children by this incestuous marriage; the heirs at law convey to a third person: the illegitimate children bring an ejectment, obtain a verdict and judgment, which is reversed in error, for the reason that the relation of husband and wife could not exist, the legislature pass a law, declaring that this relation of marriage shall exist, in the pending cause, any law to the contrary notwithstanding, and legitimate the issue. Could this act be set up on the new trial in this ejectment? The answer must be *no*. I cannot distinguish this case: if there is any difference, it is that the issue are innocent; while here the *Connecticut* claimants, in the very act of leasing, committed a high offence.

It has been urged in this court, that they have declared certain acts to be constitutional, which deprived individuals of their vested rights. The matter is misunderstood. The acts referred to, were those confirming irregular proceedings, defects in acknowledgments by feme coverts, of conveyance of their lands, as in the cases of *Tilly v. Underwood*, and *Tate v. Stoolfoos*, decided the last term at *Lancaster*. These are customary acts of legislation; not taking away a vested right, for there can be no right to do wrong: preventing one from taking an undue advantage of mere matter of form, when the transaction is a *bona fide* one, and to protect *bona fide* purchasers; but this act is of a very different kind. It destroys an absolute, lawful contract, and sets up an unlawful one in its stead. It makes the right give way to the wrong. It makes a new contract without the consent of the party, and makes it relate to an antecedent time. It takes away the perfect right of one man, and vests it in another, not for public purposes or with just compensation. It reverses the judgment of the highest judicial tribunal in the state, and gives a new rule of property in a pending cause, contrary to the present rule. It makes a relation to subsist for thirty years, which never had a legal existence, and which was indictable; and all this against the legal owner and legal title, in favour of one who claims the land; because of his transgression of the law, and a spurious title relinquished and abandoned. The controversy between *Pennsylvania* claimants on *Pennsylvania* rights, having nothing to do with *Connecticut* claims, is changed by this new rule into a different channel; and made to depend on a relation forbidden by the present law, and determined judicially in the very cause not to exist. The

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act does not in express terms include the case, and should not be extended beyond the letter. *Volunt sed non dixerunt*. But, if it did, then I am prepared to discharge the painful duty of declaring the act, in all its bearings and relations, to be unconstitutional and void. Here, if the judgment is affirmed, the *Pennsylvania* title is extinct by the limitation acts; the *Pennsylvania* claimant liable for rent, or for the mesne profits, to the *Connecticut* claimant; the plaintiff in error amerced in costs for prosecuting his just rights, and for reversing an unjust judgment. I lament this decision, as well on the grounds of justice and the constitution, as on that of good policy; the unhappy controversy had been put to rest by an immense sacrifice of *Pennsylvania* treasure, and some *Pennsylvania* blood; but, the flame may be revived by raising up this new doctrine. This would be regretted by all good men, and by none more than the *Connecticut* settlers; who now enjoy in security, by the unexampled bounty of this state, the fairest portion of her soil. I must dissent *in toto*, from the opinion just delivered. I could not subscribe to it without pronouncing the whole system of *Pennsylvania* legislation, with respect to *Connecticut* intrusion, to be impolitic, fraudulent, barbarous, and unnatural, and without pronouncing all the decisions from *Vanhorne v. Dorrance*, down to the decision of this cause in 1825, to have been founded in error and mistake: this I cannot conscientiously do, because I think the whole system was just and wise and constitutional; or if there was a violation of the constitution, it was by a sacrifice of the rights of individuals claiming under *Pennsylvania*, never acquiesced in in any other country. The cutting up the *Connecticut* title by the roots was the avowed object of these laws; so far as the legislature has quieted a certain class of these claimants, and certain districts of country, these men are now firmly settled under the laws of *Pennsylvania*, and I would be the last man to travel into doctrines that would disturb them. All this has been established and rights restored; but, if this law be constitutional, what is to prevent the legislature from repealing all these quieting acts, and restoring the *Pennsylvania* holder to his original rights. This district of country was not within the quieting acts, the *Matthewsons* not protected by them. All the title depends on the *Pennsylvania* rights. Whichever of them is the oldest ought to prevail; but by affirming this judgment, we decide that the purchaser of the elder and better title under *Pennsylvania* is a guilty man, and must surrender up his possession to the claimant under *Connecticut*; that because he once held under a lease forbidden by the law, he never can purge himself of this iniquity, by obtaining the just title, but must surrender up his *Pennsylvania* title to the *Connecticut* claimant, who now is to be rewarded for his sufferings in opposing the law, and treated as an injured and oppressed man. The question was in its nature a question of title, a matter for the decision of a judicial tribunal. The legislature was

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not acting in the character of a court of justice, it was exercising a sheer act of power in which it was controlled only by its own will; its act is to be supported by its power alone, and the same power, if it be one without limits, may divest any other individual of his lands, if it be the will of the legislature so to exercise it. The principle maintained by the defendant in error is, that a legislature may by its own act divest the vested estate of any man, for reasons which shall by itself be deemed sufficient. There can be no doubt but that *John F. Satterlee* acquired the title fairly, and for a valuable consideration. The legislature of the state, by the particular provision of the constitution of the *United States*, was restrained from passing a law whereby the estate of the plaintiffs in error, so purchased from the state, could be constitutionally and legally impaired.

My opinion is that the judgment should be reversed.

Judgment affirmed.

[SUNBURY, JUNE 20, 1827.]

BENNETT *against* HETHINGTON and others.

IN ERROR.

The declarations of a party at the time of making a settlement are evidence of the intent with which he entered on the land.

A tenant in common is a competent witness for his co-tenant, in an ejectment brought by the latter.

ON a writ of error to *Lycoming* county, it appeared that *George Bennett*, the plaintiff in this ejectment, claimed an undivided third part of two hundred and forty acres of land in *Nippertown* township, the premises in dispute, under an improvement alleged to have been made by *John Huff*, in 1795, and conveyed by him by articles of agreement, in 1797, to *George Bennett*, who remained in possession until a judgment by default was obtained against him, when he was dispossessed.

After having examined a witness as to the alleged improvement, the plaintiff proposed to prove by him the declarations of *Huff*, at the time of settling, "That he was settling on the land in dispute, as vacant land, and to take it up by improvement;" and to follow up this evidence by proof that the plaintiff claimed under *Huff*.

The defendants' counsel objected to the evidence, which the court rejected; and at the request of the plaintiff's counsel, sealed a bill of exceptions.

The defendants, *David Hethington*, *Robert Carson*, *David Crawford*, and *William Benjamin*, claimed under a warrant,

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to *Philip Penn*, of the 22d of *September*, 1794, and a survey purporting to have been made the 28th of *September*, 1794, and returned into office on the 23d of *March*, 1795; and a deed poll from *Philip Penn* to *William Benjamin*, dated the 15th of *April*, 1796, and acknowledged the 3d of *February*, 1809.

The plaintiff alleged that the defendants' survey was not actually made on the ground at the time it purported to have been made; but that *Benjamin* got the return accepted among a bundle of others which were made by a deputy of *Joseph Wallis*, the deputy surveyor, and that he afterwards went on the ground and made the survey. To establish these facts, the plaintiff called witnesses; and among other testimony offered the deposition of *James Bennett*, to prove the settlement of *John Huff* previously to the survey. At the time this deposition was taken, *James Bennett* also claimed an undivided third part of the above mentioned two hundred and forty acres. The evidence being objected to, the court rejected it on the ground that the witness was tenant in common with the plaintiff, and therefore incompetent. This decision formed the subject of a second bill of exceptions, which the court sealed at the request of the plaintiff's counsel.

Anthony and Bellers, for the plaintiff in error.—The declarations of *Huff* at the time of making the settlement, were evidence to show *quo animo* it was made. They were part of the *res gestæ* accompanied by the acts previously proved: "a manifest intention of making it a place of abode," agreeably to the act of assembly. These declarations repelled the supposition that *Huff* was not settling in his own right. The law on this point is perfectly clear. *Phill. Ev.* 202. 1 *Johns. Rep.* 159, 163, 164. *Wright v. Small*, 4 *Yeates*, 562.

2. *James Bennett*, having been, when his deposition was taken, a claimant of one third of the tract as well as the plaintiff, did not disqualify him as a witness. Two persons out of possession cannot be tenants in common. If one recovers his undivided part in ejectment, he is not tenant in common with his former partner, but with the person who has the possession, and against whom he recovers, and partition may be made between them. The titles of tenants in common are distinct, and a recovery by one does not enure to the benefit of the other. They cannot recover in ejectment on a joint demise. *Runnington on Ejectments*, 222. The objection therefore goes to the credit, and not to the competency of the witness. He is interested only in the question involved, not in the result of the suit; and, unless he is to gain or lose by the event of the cause, or the verdict could be used for or against him, it is now perfectly settled that the witness is competent. 3 *Johns. Ch.* 82. *Lessee of Cox v. Ewing*, 4 *Yeates*, 429. If joint trespassers are sued in separate actions, they may be witnesses for each other. 1 *Wash. Rep.* 187. *Wakely v. Hart*, 6 *Binn.* 316. One of several lessors in ejectment may have his name struck out by leave

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of the court, and be a witness. 4 *Johns.* 143. 1 *Bl. Com.* 194. *Co. Litt.* 198. n. b. The case of *Vanswearingen v. Ross*, 7 *Serg. & Rawle*, 192, goes very far to decide this question.

Campbell, for the defendants in error, admitted that in general the declarations of a settler were evidence of the *quo animo*, he made the settlement. But in the present case, all the acts of *Huff* showed the *quo animo*. There was no question as to that; and therefore the declarations were improperly admitted.

2. *James Bennett* was tenant in common with the plaintiff, and had an interest in promoting his recovery. The slightest interest is sufficient, and renders one incompetent as a witness. It is sufficient, if the evidence of the person offered tends to increase a fund in which he is interested. 1 *Phill. Ev.* 51, 52, 53. 10 *Serg. & Rawle*, 269—274. 5 *Johns. Rep.* 427, 458. 2 *Dall.* 50. 1 *Muss. R.* 239.

Tenants in common have unity of possession. No one knows his own severalty, but the possession is undivided and promiscuous. If, therefore, the plaintiff recovers, his co-tenant will be in possession with him of the part recovered. It follows that tenants in common cannot be witnesses for each other. 2 *Bl. Com.* 194, 197. *Co. Litt.* 292, 200. 3 *Bac. Ab.* (*Wills. Ed.*) 688. 10 *Serg. & Rawle*, 187. 11 *Johns.* 461. 15 *Johns.* 501. 3 *Bac. Ab.* 709. 3 *Wills.* 1118.

The case was argued on the 3d of *July*, 1826, and held under advisement until the present time, when *GIBSON, C. J.*, delivered the following opinion.

GIBSON, C. J.—It has never before been doubted that the declarations of a party, at the time, are evidence of the intent with which he entered; and, this is all that is necessary to be said in respect of the first point.

The question, whether a tenant in common be a competent witness for his co-tenant, in an ejectment by the latter, has not been decided in terms; but, a principle broad enough to cover the particular case, has been established by many decisions. The beginning of this principle, is an epoch in the law; previous to which, questions of competency depending on interest, were decided on subtle and arbitrary distinctions, that are now considered a reproach to the profession; and, in returning to them, we should recede from what is universally considered an improvement. Nothing can be plainer or of more ready application, than the distinction between interest in the question, and interest in the event of the suit. Although the case of the witness be, in every point and particular, the case of the party by whom he is called to testify; although he expect a benefit from the event; and, in short, although he be subject to as strong a *BIAS* as can influence the understanding and actions of man; yet, if he be not implicated in the

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LEGAL consequences of the judgment, he is competent. By legal consequences are meant those that are fixed, certain and actual, and by which an advantage not *depending* on a contingency, is to be gained or lost: such, for instance, as being entitled to give the verdict in evidence in another suit, on the one hand, or being subjected to an incumbrance or duty on the other. This is what I understand to be the modern rule, as established in this country for its intrinsic excellence and good sense. Whether the case before us falls within it, will depend on the consequences of tenure in common as regards joinder in action. In PERSONAL actions, though concerning the realty, the interests of tenants in common are inseparable, and they MUST join. So, in REAL actions for an ENTIRE THING. But, in real actions to recover the SEISIN OF LAND, they shall NOT join, because their estates are several; and therefore, as each must recover according to the nature of his own estate, to suffer them to join, would subject the jury to the perplexity of trying two or more titles in the same issue. That this does not hold in ejectment also, is attributable to the fiction, by which the estates of all the plaintiffs are supposed to be united in the person of the lessee who is the plaintiff of record, and, in contemplation of law, the party in interest. And here, we remark another consequence of the severalty of their estates—they cannot like joint tenants, who are seised *per my et per tout*, join in a general demise of the whole, but each is to demise for himself. But so little does it accord with the policy of the law to *compel* them to join in ejectment, that their being suffered to do so, is a consequence neither foreseen nor intended by those who contrived the machinery of the action. Here, the plaintiff has elected to sue alone, and what would the witness gain by his recovery? The possession of his own freehold would not be restored; but for that, he would be driven to a separate action, in which the verdict in this, would not be competent evidence. Neither would the possession of his co-tenant when recovered, avail him to save the bar of the statute of limitation; for he who recovers an undivided interest in a several action, holds in common with him from whom it is recovered, the latter continuing to hold the estates of those who remain ousted. The entry of one tenant in common, is the entry of both, only where he does not enter specially for himself; but, in this respect, there is a strong analogy between a special entry, and a separate action in which the plaintiff must necessarily recover the possession for himself. Nor before a recovery by both, can the possession of the one be the possession of the other; an actual occupancy by wrong, being indisputably adverse to him who has the right. I admit that a tenant in common is not competent to support the possession of his co-tenant where the latter is defendant in an ejectment, founded on a title adverse to the title of both. But this discrepance between a case where the co-tenant is plaintiff, and one where he is defendant, becomes the less stri-

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king as we reflect, how frequently questions of this sort depend on the situation of the parties. A more imposing difficulty is the reciprocity that exists among parties who can produce by the evidence of each other in successive actions, substantially the result of a joint recovery by all. But this reciprocity is more apparent than real; the supposed *quid pro quo*, not being a debt or duty, but a gratuity in kind. Such as it is, however, it must be borne with as an evil inseparable from our nature, and one which necessarily exists in a greater or less degree in all cases, and under every modification of circumstances. A party and his witness may drive a bargain in any case, whether the perjury is to be repaid in kind or requited with money; yet that they happen to be placed in circumstances which constitute a strong temptation to make common cause in prosecuting their claims, or eluding their liabilities, affords no objection to their competency. Such considerations are held not to disqualify a witness who has signed the same policy; or who is separately sued for the same trespass; or separately indicted of perjury, in swearing to the same fact; or a seaman who has served aboard the same vessel, in an action for seamen's wages: yet, in all these instances which are put by Mr. *Phillips* by way of illustration, the party and the witness are from identity of situation, exposed to the same temptation that may warp the testimony of tenants in common, who have separate actions depending for their respective freeholds. I therefore, perceive no sufficient reason for the rejection of the witness.

DUNCAN, J., and ROGERS, J., concurred.

HUSTON, J., dissented.

TOD, J., was not present at the argument, and took no part in the judgment.

Judgment reversed and a *venire facias de novo* awarded.

[SUNBURY, JULY 2, 1827.]

MARTHA COOK, Executrix of WILLIAM COOK, against
GEORGE GRANT.

IN ERROR.

A devisee who releases all interest under a will, is a competent witness for the trustee appointed by it.

If a vendor on a contract of sale conceal the fact that part of the land contracted for belongs to a third person, it is a fraud.

The covenant of warranty by such person, contained in a deed afterwards made by him in favour of the vendee, is not an equivalent for the covenant of the vendor.

If such third person delay executing the title, declaring he would keep the land, or convey it only on certain terms, his conveyance at a late day will not entitle the vendor to relief.

If such third person, by collusion with the vendee, swear in a judicial proceeding, that the contract of sale is at an end, neither can afterwards set it up against the other.

ERROR to the Court of Common Pleas of *Northumberland* county

Scire facias of a mortgage on four tracts of land therein specified, dated 23d of *May*, 1814, given by *George Grant* to *William Cook*, to secure payment of three bonds, amounting together to sixteen thousand nine hundred and ninety-nine dollars and ninety-nine cents, the first payable on the 1st of *May*, 1815; the second, on the 1st of *May*, 1816; the third, on the 1st of *May*, 1817, all bearing interest from the 1st of *May*, 1814. On this mortgage several payments had been made, and there were some judgments remaining a lien upon the estate of *William Cook*, sen., deceased, part of whose estate was the land mortgaged, the whole amount of which the plaintiff consented should be deducted from the amount of the mortgage, being willing to look to the other devisees of *William Cook*, sen., for the contribution of their respective parts. As a defence to the *scire facias*, it was alleged, that the consideration of this mortgage was five tracts of land, containing in the whole about five hundred acres, and that one of them of about one hundred and fifty acres, called the *M'Cully* tract, the defendant had no title for. The plaintiff tendered and filed a deed in court for this tract. It was in evidence, that it was left out of the deed to *George Grant*, and left out of the mortgage given by him to *William Cook*, with the consent of all the parties concerned.

The reasons assigned for leaving out the *M'Cully* tract were, that *Alexander Colt*, at the time of the delivery of the deed had some claim to it, and that the legal title to it was vested in *James Lemons*, the father-in-law of *William Cook*.

The defendant offered as a witness *William Grant*, who was objected to by the plaintiff's counsel. In support of the objection

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they read the will of *Thomas Grant*, bearing date 12th of *May*, 1815; from which it appeared, that the five tracts of land above-mentioned, were held by *George Grant*, in trust for his father, *Thomas Grant*, who had advanced all the purchase money which had been paid. He directed his executors to pay the residue of the purchase money, and that the said five tracts be subject to the general division to be made among his children, of whom *William*, the witness offered, was one. In order to remove the objection to the competency of the witness, the defendant read to the court a release, dated *August 25th*, 1825, by *William Grant* and wife to his mother *Deborah Grant*, of all his interest in his father's estate, and contended that being no longer interested, he ought to be received as a witness. The court, however, rejected the witness, and at the request of the defendant's counsel, sealed a bill of exceptions.

The plaintiff tendered to the defendant in open court a deed, dated *August, 25th*, 1825, from *James Lemons* and wife to *George Grant*, for the *McCully* tract.

James Lemons was then sworn, who testified that he was present when the deed and mortgage were exchanged, and the money paid. One reason why the *McCully* tract was not included in the deed was, that *Cook* had previously sold part of it to *Alexander Colt*, and the witness wished a settlement with *Colt*, lest *Cook* should be prosecuted for selling the land twice. He also wished the price of the *McCully* tract fixed in such a way that *Cook* could not spend it. He took *Thomas Grant* out and told him, "he wished the money secured;" but he did not recollect that *Grant* refused the deed until that tract was put in. The witness was satisfied with the sale made by *Cook*, and was present when the deed was made, and the papers securing the dower of Mrs. *Cook*. A settlement was afterwards made with *Colt*, who had begun to build a mill, and had part of the race dug. He did not know of any particular delivery of possession to *Grant*. He had nothing to do with the land since. Never rented it or received any of the proceeds. A good part was cultivated. When *Cook* sold it to *Grant* it was leased to *Furman*, afterwards to *Fries* and *Gaskin*. After *Cook* moved to *Bloomsbury*, the witness acted for him in presence of Mrs. *Cook*, and in his absence had a power of attorney from him. He was present at a calculation made by Mr. *Priestly* and *John Cook*, in the presence of *George Grant* and *William Cook*. They were appointed by *George Grant* and the witness; at the time appointed *J. Priestly*, *John Cook*, *George Grant*, *William Cook*, and the witness attended. *William Cook's* mind was at that time very weak, and the witness acted for him. They went over the accounts, receipts, &c., and a statement was made out by *J. Priestly* on the 16th of *April*, 1821. Something was said by *George Grant* about the deed for the *McCully* tract, and the witness said he might have it

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at any time. The witness frequently conversed with *George Grant* about the *M'Cully* tract, and said he might have the deed for it at any time—offered it before the witnesses. He said he would not give a cent for any title that was in me. About the time that suit was commenced on the mortgage for Mrs. *Cook's* dower, after its commencement, the witness told him he ought have the title for the *M'Cully* tract. *George Grant* told him not to give him the title, that he wanted to defeat *Simpson*. Afterwards when the witness said to him the same thing, he said, "I bought no land of you."

About the time of the arbitration in this suit with *Simpson*, the conversation took place, in which *Grant* asked the plaintiff not to make a deed. The witness then told *Grant*, he ought to have the deed for the *M'Cully* tract. *Grant* told him, no—not to give it to him now; he wished to defeat *Perry Simpson*. When we were laying a plot to defeat *Simpson*, it was at the place of the arbitration; no one was present but *Grant*, *Hepburn* and *Simpson*. *George's* title was spoken of, and of the witness having the title to the *M'Cully* tract. Mr. *Hepburn* did not like to engage in it. There was no plot: he seemed to be afraid to go on with the suit. I advised him to go on, and said, he could not fail to gain it.

The witness told *Thomas Grant* privately, he wished the proceeds of that tract might be secured to the wife and family of *William Cook*: he was satisfied, and the money was paid. A bond was deposited with Captain *Boyd* to secure the dower of old Mrs. *Cook*. *Thomas Grant* pulled out of his pocket part of the money. *George* had part. The witness paid one hundred and eighty-six dollars for the *M'Cully* tract. In 1811, Mr. *Cowden* swore it was worth ten dollars, and the witness thought it a high price.

John Hannah testified, that *Cook* told him in the winter of 1814, he had sold all his possessions in that property to *George Grant*. After *Cook* moved to *Bloomsbury*, *Lemons* said, that *William Cook* had been to *George Grant* to receive a payment, and he had received a payment and gone to *Bloomsbury*, and he was informed that several persons had gone from *Sunbury* after and with him, to get him to gamble, and get the money out of his hands; and it was his opinion the money would never do him any good—that there was part of the property, the title to which was in him—that if he got the mill, all the rest he was to take care of, and keep that for his wife and children. *Lemons* said he was present when the survey was made of the land sold to *Alexander Colt*—that he went along with them till they interfered with the *M'Cully* tract, and he then told them to stop.

William Wilson testified that he was present when *Cook* and *Grant* first made the bargain; they had concluded so far as that *Grant* offered him two thousand dollars.

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They then went to Mr. *Hamilton's* room. The number of acres was mentioned. *Grant* said, if there was so many acres he would give two thousand one hundred dollars. *Cook* replied, there were five hundred acres good, if not more. They went to *Hepburn* to draw the article, but he would not for fear of the forfeiture—there was to be a deduction in proportion to the quantity wanting. The article was then finally agreed on, but no article was drawn.

Lemons told the witness he had purchased the tract of land that was sold as *William Cook's*, and he had the deed in his pocket, and he would never make it over to *Cook*, but keep it for his wife and children, after *Cook* had spent all he had. He showed me the deed signed *Daniel Lebo*, sheriff. I was present when *Lemons* said he should fix a day to go up and make him a deed; and *Grant* said he had bought no land of him.

A power of attorney, dated *August 29, 1820*, was then produced from *William Cook* to *James Lemons*.

George Kremer testified, that *Lemons* said he had purchased the *McCully* tract, but he never meant to make any thing by it; that he was present when the sale was made to *Grant*. He said he was perfectly willing to convey, but wanted the money arising from the sale secured to Mrs. *Cook's* family; and asked my advice, whether he was bound to convey until it was secured; that the title was in him, and he had consented to the sale. I gave him my decided opinion, that he was bound to convey.

Jacob Cook, a witness for the defendant, stated, that *Lemons* told him he was on the jury when the *McCully* tract was condemned. After the *McCully* tract was struck off to him, he gave the crier one dollar, which made one hundred and eighty-six dollars: he intimated that he would have the deed—he did not know what had got into my father's and mother's head to suppose *Bill Cook's* money had bought the land—his own money paid for it. He said, he “paid for the land—he had the deed, and would keep it.”

Jacob Tunn testified, that *Lemons* said he was glad he had the deed for the *McCully* tract—he would have that at all events, for the widow and children, if he should lose the rest in the trial between *Stedman* and him.

Alban Newberry testified, that *Lemons* told him, *William Cook* was spending his money as fast as he could—that *George Grant* had better be cautious about paying the money for this tract, as one part of the title was in him, and he intended to keep it for his daughter. The defendant then offered the administration account of *Thomas Grant*, executor of *William Cook*, dated 23d of *January, 1810*. Balance due on account three hundred and twenty-six dollars and thirty-five cents. The plaintiffs objected, and the court sustained the objection; and at the defendant's instance sealed a bill of exceptions.

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John Cowden testified, that *Lemons* told him he would not make title to *Grant* for the *M'Cully* tract—that he intended to keep it; for he thought his son *Cook* was not doing well, and would run through the property, but that he would save that for Mrs. *Cook* and the children. He said this several times, both before and after the sale to *Grant*. Did not say the proceeds, but the land itself. *Grant* was not present at any of these conversations.

Jeremiah Simpson testified, that at the arbitration in the suit *James Lemons* for the use of *Sarah Cook* v. *George Grant*, in July, 1822, *Lemons* was produced as a witness—he came forward with a deed in his hand, and laid it on the table—said he had purchased the property, meaning the *M'Cully* tract, and paid for it, and meant to hold it. There was a short instrument drawn up, proposing that *James Lemons* should convey the tract to the defendant, *Grant*; and on the heirs of *William Cook*, senr., deceased, agreeing not to demand any money that *Grant* should pay to *Sarah Cook*, he should immediately pay *Sarah Cook* six hundred dollars. It was refused by *Lemons*, who said he was not to convey it—had paid for it, and would hold it.

Henry Masser was an arbitrator in the case of Mrs. *Cook* v. *George Grant*, for the widow's dower. *Lemons* was a witness: he brought a deed for part of the land purchased by *George Grant* of *Cook*. He stated he had a title for it—he did this to defend *George Grant* from paying the whole dower. He was sworn, and had the deed in his hand—he said he would not give it up till he was satisfied. This arbitration was in 1823.

James Lee, also an arbitrator, stated that *Lemons* said he meant to keep the *M'Cully* tract for the widow and heirs. *George Grant* said, if they would make him a title to the property, he would pay Mrs. *Cook* six hundred dollars—*Lemons* said he would not give it up.

The deposition of Mrs. *Cook* proved that *Lemons* said, he would keep the *M'Cully* tract for *Martha Cook* and her heirs.

The plaintiff, to rebut, produced *Daniel Garton*, who proved that he lived on the *M'Cully* tract, as tenant of *Grant*, four years last April—*Peter Fries* lived there before him; he did not know under whom.

John Boyd and Mr. *De Gruchy*, proved that there was an amicable reference between *William Cook* and *George Grant*, about the possession of the *M'Cully* tract, and the referees allowed him three hundred and thirty-three dollars for being kept out of possession. Both were satisfied. *Lemons* was examined as a witness, and there was no complaint that he would not to make title.

P. Lemons.—I was present after the calculation of Mr. *Priestly* and *John Cook* was made. My father said he was ready to give him a title at any time. *Grant* said he would not to give a cent for

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any title he had—he had bought the land of *William Cook*, not of him. My father has never been in possession since. He said he wished that tract to go to the benefit of *Cook's* wife and children; always said it should not be divided among his other heirs.

James Hepburn. On a former occasion some years before, *George Grant* demanded a deed from *Lemons*, who turned on his heel—turned from the subject.

The President of the court below charged the jury, among other things, as follows:—

The reasons which have been assigned for leaving out this *McCully* tract were, that *Alexander Colt*, at the time of the delivery of the deed, had some claim to this tract, and, that the legal title for this tract was vested in *James Lemons*. It, therefore, became necessary for *William Cook* to extinguish the claim of *Colt*, and procure a deed from his father-in-law, *James Lemons*, to complete a title to *George Grant*. It is in evidence, that *William Cook* extinguished the claim of *Alexander Colt*. There was then no obstacle but for *Lemons* to convey: he was willing to convey upon the amount being secured to Mrs. *Cook* and her children. It is in evidence, that *James Lemons* was present at the delivery of the deed and mortgage; that he assented to the sale made by his son-in-law, *William Cook*, to *George Grant*; that he saw the first instalments paid by *Grant*, and bonds given for the balance. Possession of all the five tracts was taken by *George Grant*; he has held possession ever since, and a deed is now brought into court, and tendered to *George Grant*, and filed. *George Grant* recovered by a reference three hundred and twenty dollars, as a consideration for his not obtaining possession of the *McCully* tract as soon as he was entitled to it. *James Lemons* standing by, and seeing his son-in-law, *William Cook*, sell a tract of land to which he had a legal title, and, not objecting, *Lemons* would be postponed. Of this fact the jury will determine. A parol contract for the sale of land, the purchaser paying part of the purchase money, giving bonds for the remainder, and the purchaser taking possession and holding possession, is a part execution of a contract which cannot be rescinded without the consent of both parties; nor is such a case within the statute of fraud and perjuries. Upon the one hand, *George Grant* is entitled to a legal title, and the plaintiff to her money, which would be a compliance with the contract. If *George Grant* had tendered the purchase money, and demanded his title, and it had been refused to him, it would have presented a different case.

The court are of opinion that the tender of the deed, and filing it in court, is sufficient to entitle the plaintiff to recover the purchase money. But if any legal objection could be made to the acceptance of the deed from any defect of title, or a want of proper warranty, the court could stay execution, and would do it until the title was completed. There has been a great fall of property since this pur-

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chase. It would appear that the *Grants* gave an extravagant price for this land, and every person must commiserate their situation. But whether land rises or falls in price, the court has no power to alter the contracts of the parties. If it was not in the power of the plaintiffs to make a title for the *M'Cully* tract, the court would direct the jury to deduct the value of this tract from the purchase money of the mortgage; but there was no evidence before the court but what *Lemons* can make good the title; and if the deed filed in the court does not convey a good title, the court could stay execution until every defect, if any, is remedied.

The defendant requested the court to charge the jury as follows:

1. That, as there was no contract between *James Lemons* and *George Grant*, for the *M'Cully* tract, there could be no part execution of contract in the present case; and that this is not a case of part execution of contract.

2. That *James Lemons* has done no act by which he would be bound to convey to *Grant*, and that, as he is not bound, *Grant* also is not bound.

3. The Court are requested to state by what act or acts, if any, *Lemons* is bound to convey to *Grant* the *M'Cully* tract.

4. That *James Lemons*, in an ejectment, might legally recover possession of the *M'Cully* tract; nor has he done a single act that would prevent his recovery.

5. That, if the jury believe that *Lemons* would not convey without settlement on *Cook's* wife, the taking possession of *Grant*, under *Cook*, was a trespass, and no part execution of the contract.

6. That *Cook* is not a *bona fide* contractor, and not having tendered a deed to *Grant*, during his life, and procured no title from *Lemons*, his representatives cannot recover for the *M'Cully* tract; and,

7. That the will of *Thomas Grant*, imposes no burden on *George Grant* to pay this money.

The court gave the following answers:

1. *James Lemons* assenting to the contract made by his son-in-law, (if the jury are satisfied he did assent;) his standing by, seeing *Grant* pay part of the purchase money, give his bonds for the remainder, giving possession to *George Grant*, *James Lemons* would be bound to convey, and these acts would be a part execution of the contract.

2. In every contract, there must be a reciprocity, so as to be binding on each party; and *Lemons*, by assenting to the contract made by his son-in-law, *William Cook*, with *George Grant*, is bound to convey to *George Grant*.

3. In answer to the first point, the court have answered this point.

4. *James Lemons*, by assenting to the contract made by *Cook*

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with *Grant*, could not support an ejectment against *George Grant*, except for the recovery of the purchase money.

5. If the jury believe *George Grant* took possession of the *McCully* tract, by the consent of *Lemons* and *Cook*, he is not a trespasser. It was in *Cook's* power to secure to his wife and children, at any time, the amount of the *McCully* tract; and upon his so doing, *Lemon* could have made a deed. *Cook* died, and devised his estate to his wife and children.

6. *Cook* did not, during his lifetime, tender a deed; nor did *Grant* tender the purchase money, as appears from the evidence. The representatives of *Cook*, stand in the situation of *Cook*, in his lifetime, and if they fulfil their contract, he would be obliged to fulfil his contract.

7. *George Grant* is an executor of his father's estate; his father, by his will, directs this purchase money to be paid out of his estate. This would impose an obligation on his executors to pay the money, unless some legal objection could be made to the payment of the money.

The defendant excepted, and now assigned as errors:

1. There is error in the first bill of exceptions.

2. Also in the second.

3. Also in the answers to the points.

2. There is error in the court stating, that the plaintiff had a right to recover, on tendering the deed and filing it in court; and, that the court could stay execution until the deed was perfected; as a tender of the deed was necessary for the *McCully* tract, before the commencement of this suit.

5. The court erred in stating, that it was necessary for *George Grant* to tender the purchase money.

6. In stating that *George Grant* was entitled to the legal title, and the plaintiff to her purchase money.

Green, for the plaintiff in error.

First bill of exceptions.—Refusal of the court, to admit *William Grant* as a witness for the defendant. *William Grant* released all his interest in his father's estate to his mother, *Deborah Grant*, and therefore was no longer interested.

Second bill of exceptions.—The court rejected the administration account of *Thomas Grant*, executor of *William Cook*.

Charge of the court.—The plaintiff ought to make allowances for one hundred and fifty acres of land, (the *McCully* tract,) to which his testator had no title, and was unable to procure a title during his life, because *Lemons*, who had the title, refused unless the price of these one hundred and fifty acres was secured to his daughter. *Cook* acted *mala fide*, in contracting to sell land which he did not own. *Sugd. Vend.* 158. 1 *Madd. Ch.* 415. 1 *Johns. Ch.* 370.

Cook was to have given a general warranty, as may be inferred

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from his general warranty in his deed, conveying the other lands. *Cook* is dead, and the general warranty cannot be had, nor did the deed from *Lemons*, which was tendered, contain a general warranty.

The court erred in saying that *Lemons* could not recover against *Grant*, because he stood by and saw his son-in-law make the contract; whereas the evidence was, that *Lemons* told *Grant*, at the time, that he would not convey this land, unless the price was settled on his daughter. *Grant*, at least once, demanded a deed, and *Lemons* refused to give it. Nay, he swore before the arbitrators, that he would not do it. *Cook* did not comply with his contract during his life, and we say, that on his death we may consider the contract as rescinded.

There was error in the court's answer to our points.

First point.—There was no contract between *Grant* and *Lemons*, and, therefore, we could not compel *Lemons* to give us a deed.

Second, third, and fourth points.—*Lemons* had a right to recover this land in an ejectment, because he had done no act to bind himself, unless the money was secured to Mrs. *Cook*.

Fifth point.—*Grant* might be considered as a trespasser, by entering on *Lemons's* land.

Sixth point.—This point was, that as *Cook* gave no title to *Grant* during his life, his representatives had no right to recover the purchase money after his death.

Fourth error assigned.—The court erred in saying, that the tender of the deed, pending the action, cured all defects, and took away all equity from the defendant.

Greenough, for the defendant in error.

Thomas Grant, (father of the defendant,) made his will about a year after date of the defendant's mortgage, and devised the property purchased in the name of the defendant, among his children. After this, the defendant claimed before referees, and had an allowance for the profits of the *McCully* tract for several years, which was under a lease made by *William Cook*, before the defendant purchased of him. Afterwards, at the defendant's request, *Lemons*, before referees, in a suit between old Mrs. *Cook* and the defendant, declared that he would not convey the *McCully* tract. This was done, in order to defeat *Simpson*, who managed this suit as Mrs. *Cook's* friend.

First bill of exceptions.—To the competency of *William Grant*, as a witness. *William Grant* was an executor of his father, *Thomas Grant*, and had settled no account. He was answerable to *Thomas Grant's* creditors for the rents and profits of the real estate, because the will ordered the executor to pay his debts, in the first instance.

Second bill of exceptions.—Rejection of administration account

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of *Thomas Grant*, executor of *William Cook*, the father of the testator. This account could not be evidence. It was offered to show, that the balance due to *Thomas Grant*, on a settlement of his administration account, was a lien of this land. But we agreed that all liens should be deducted from our claim, so that there was no dispute on that point. Chancery will give time to complete a title, especially where the purchaser knew of the defect of title. *Sugd. Vend.* 285. 2 *Johns. Ch.* 519. *Frick v. Vanhorn*, 3 *Serg. & Rawle*, 282. 10 *Serg. & Rawle*, 140. Chancery would not relieve the defendant, because he knew that the *McCully* tract was not included in the testator's (*Cook's*,) deed to the defendant, and made no objection. 2 *Johns.* 575. *James Lemons* was privy, and consented to the contract of sale; and, therefore, could not defeat it by setting up title to part of the land. *George Grant* kept possession of the *McCully* tract till the death of *William Cook*, and after. *William Cook* (the testator,) died in October, 1821. His father died in 1804.

Bellas, for the defendant in error.

The *McCully* tract was sold by the sheriff, on a judgment against the executor of *William Cook, the elder*. *James Lemons*, the father-in-law of *William Cook*, (the plaintiff's testator,) bought it for one hundred and eighty dollars. *Thomas Grant* died in June, 1815.

First bill of exceptions.—*William Grant* was *prima facie* interested, and it lay on him to show that he was disinterested.

Charge of the court.—Neither *Thomas* nor *George Grant* was deceived by *Cook*: the only person deceived was *Cook*, who knew nothing of the private conversation between *Lemons* and *Thomas Grant*, when the deed of conveyance was given. Chancery would never relieve *Thomas Grant*, who was privy and consenting to the whole transaction. *Lee v. Porter*, 5 *Johns. Ch.* 268. *Murray v. Finster*, 2 *Johns. Ch.* 155. *Id.* 275, 288. When the plaintiff has legal title, it is sufficient if he *does equity during the trial*. *Moody v. Vandyke*, 4 *Binn.* 31. 5 *Cranch*, 262. 1 *Wheat.* 179. 9 *Serg. & Rawle*, 87.

In 1822, the defendant was examined as witness in a suit between *Stoolman* and *Cook*, and stated a large balance due from himself on this mortgage. If one means to rescind a contract, he must do it speedily. 17 *Johns.* 437. 3 *Johns. Ch.* 23. One who remained in possession, was held to performance of contract, after fourteen years. 9 *Johns.* 450.

Marr, in reply, for the plaintiff in error.

First bill of exceptions.—Rejection of *William Grant*. [The court told Mr. *Marr*, he need not speak to this.]

Second bill of exceptions.—Rejection of the administration account of *Thomas Grant*, administrator of *William Cook, sen.* This account showed a balance in favour of *Thomas Grant*, which

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was a lien on the estate of *Cook*, the elder, and consequently on the mortgaged premises.

Charge of the court.—The whole charge is erroneous. It took the cause from the jury. The contracting parties, were *William Cook*, the younger, and *George Grant*. *Thomas Grant* and *Lemons* had nothing to do with it. The defendant's bond and mortgage were given, on a promise by *Cook* to make a conveyance in a short time, of the *M'Cully* tract; therefore the mortgage was void. *Lemons* never promised or intended to convey, unless the price of these one hundred and fifty acres were settled on his daughter, (*William Cook's* wife,) and *Cook* refused to make a settlement. I consider this suit as being for the use of *James Lemons*. *Lemons* refused to convey when the defendant asked him. Land was then high—now it has fallen. There is said to have been a tender of conveyance of the *M'Cully* tract, before commencement of this suit. We say, that the defendant owes but seventy dollars, independent of the price of the *M'Cully* tract.

The opinion of the court was delivered by

GIBSON, C. J.—*William Grant* was undoubtedly a competent witness. He had divested himself of all interest, and this is all that is necessary to be said in regard to the first point.

As the cause is to be tried again, it will be more useful to point out the principles on which it depends, and which appear to have been misconstrued, than to enter into an analytical examination of the errors assigned in the opinion of the judge on the points made below; and, for this purpose, it is necessary to trace the features of the case as it appeared on the evidence.

In 1814 *George Grant* entered into a parol agreement with *William Cook*, to purchase five tracts of land, at the price of sixteen thousand nine hundred and ninety-nine dollars and ninety-nine cents; and shortly afterwards, *Grant*, attended by his father, *Thomas Grant*, and *Cook*, attended by his wife's father, *James Lemons*, met together to execute the contract. Four of the tracts were conveyed, and bonds and a mortgage executed for the purchase money of the whole five. Why the remaining tract was not conveyed, will appear in the sequel. The mortgage recites the bonds and the conveyance of the four tracts; but nothing is said of the fifth, denominated the *M'Cully* tract, as regards which, the contract still rests on parol: and the action is brought on the mortgage to recover the price of this last-mentioned tract, the price of the others being nearly, if not altogether paid.

Possession of the tracts conveyed, was delivered in season, and of the *M'Cully* tract some time afterwards; *Grant* accepting a sum of money in compensation of the delay. At the trial, *Lemons* tendered a deed for the *M'Cully* tract, executed by his wife and himself, but without warranty; on which the court charged, that the plaintiff was entitled to recover. Evidence of other circum-

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stances, thought to be material, was given during the trial, and will be noticed in the course of the inquiry.

What are the principles of the action to recover the price of land? It was formerly thought, that as the vendor wants nothing but the purchase money, which may be recovered in an action of debt, his remedy is exclusively at law, (*Sugd. Vend.* 164,) and undoubtedly an action lies. But, it having been thought proper to execute the contract specifically, it was supposed that justice required the remedies between the parties to be mutual, and in the same courts; consequently, a bill will be entertained to enforce payment of the purchase money. (*Newl. Cont.* 91.) But, in an action on the contract, even the *English* courts take cognizance of equitable objections, (*Sugd. Vend.* 178;) and, in *Pennsylvania*, where we have no separate court to control the exercise of legal rights, there is still greater reason for doing so. Accordingly, in *Huber v. Burke*, (11 *Serg. & Rawle*, 238,) it was held, that an action for purchase money is in effect a bill in equity; the purchaser being at liberty, under the plea of payment, to give evidence of any circumstance that would actuate a chancellor to withhold his assistance. In the case before us, therefore, the action is to be viewed as a bill to execute a contract, already so far executed as not to be within the statute of frauds.

The inquiry then is, whether enough has been shown to induce a chancellor to dismiss the bill. The intrinsic evidence of the transaction, as well as the testimony of *Lemons* himself, proves incontestibly that he, and not *Cook*, was the actual vendor of the *McCully* tract. He was the owner of it, and it was well known that no one else could convey it. He also exercised a superintending power over the agency of *Cook*. He says he *knew* of the sale, and *approved* of it; and the reason this tract was not conveyed with the others was, that *Cook* had contracted to sell it to *Colt*, and he was afraid *Cook* might be made liable for a breach of that contract. *But he wanted the purchase money to be settled to the separate use of his daughter, Mrs. Cook.* It was *Lemons*, therefore, and not *Cook*, who prevented the contract from being entirely executed at the date of the mortgage. Last of all, he acted openly in the business, when *Cook's* intellects had become too weak to prevent him to act even ostensibly for himself. These, no doubt, are considerations for a jury; but at present I assume as a fact, which may be satisfactorily proved, that *Lemons* was the actual vendor of this particular tract; and, if this be established, it will be immaterial that the price of it was payable to *Cook*. On the other hand, it is as little to be doubted that *Thomas Grant*, the father of the defendant, was the actual purchaser. We have then a transaction between two fathers, each treating for his child; and, in equity, these also are parties: so that it remains to inquire how far the acts of *Lemons*, as a vendor, will affect the plaintiff's title to a specific performance.

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It is admitted that if *Lemons* and *Cook* acted throughout by direction, or with the knowledge and assent of the defendant, the fact would furnish a triumphant answer to every objection to the action but one; and of that I shall speak in the conclusion. But the affirmative of the proposition depends almost exclusively on the testimony of *Lemons* himself, whose connexion with the cause is so intimate, whose bearing in the transaction is so equivocal, whose story implicates him in a conspiracy to defraud, and who is contradicted in material points by so many witnesses, that his testimony ought to be left to the jury, with a direction to find for the defendant, if he were thought unworthy of credit.

But if *Cook* concealed the ownership of *Lemons*, and the delusion were kept up till the mortgage was executed, the plaintiff must fail. The suppression of that fact would be a positive fraud, which, according to *Duncan v. McCullough*, (4 Serg. & Rawle, 488,) would so infect the contract as to render it incapable of subsequent confirmation without a new consideration; and fraud in the concoction of a bargain is a decisive answer to a bill for specific performance. Where the contrary is not stipulated, a purchaser is entitled to the conveyance and the covenants of the vendor himself. Here the conveyance of the other tracts by *Cook*, contains a covenant of general warranty; and, if the parties intended that he should convey this tract also, it would be fair to infer that the deed was to contain the same covenant. The deed tendered by *Lemons* at the trial contains no covenant at all; but that is comparatively of little importance, as although the personal responsibility of *Cook* may have been an object of less value than that of *Lemons*, yet, if the defendant bargained for it, he is not bound to accept of any thing else as an equivalent. So that *Lemons's* conveyance with or without warranty, would not be an execution of the contract on the part of the vendor.

Again. If *Lemons* declared at different times, and on different occasions, that he had bought and paid for the *McCully* tract, and would keep it, that would furnish a substantial ground of objection to the action. A bill for a specific performance is an application to the discretion of the chancellor, who will not interfere where the party who seeks relief, has trifled or shown a backwardness in performing his part of the agreement, especially, if in the meantime a change has taken place in the situation of the parties, or an alteration in the value of the property. There must be no temporizing, but the plaintiff must show that he was always "ready, desirous, prompt, and eager."* If, since the time when the conveyance was to have been made, he has done any act inconsistent with the equitable ownership of the vendee, such as incumbering, he will be concluded; as in *Huber v. Burke*, (11 Serg. &

* Vide *Milward v. Thanet*, 5 Ves, 720, note b.—REPORTER.

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Rawle, 238.) Laches *per se* may be an insurmountable obstacle; and the delay of even a few months has been a bar where there was an alteration of the value. (1 *Mad. Ch.* 417.) If then the jury shall believe that *Lemons* withheld the title because *Cook* was a spendthrift, and would not be prevailed on to settle the purchase money to the separate use of his wife, or even if without this or any other particular motive, he declared a determination not to execute the contract, he comes too late, after *Cook's* death has removed the cause of his repugnance, to put *Cook's* wife in a situation to call for the purchase money, and compel the defendant to take the property after it has greatly depreciated.

On the other hand, there is a circumstance which is a waiver of all delay previous to the time when it occurred. I allude to the compensation awarded to the defendant in 1817, for having been kept out of possession of this tract after the possession of the others had been delivered. The acceptance of this compensation was a recognition of the contract as existing for the purpose of specific execution, but subsequent trifling or backwardness might still be set up as a defence. What passed at the settlement before Mr. *Priestly* and *John Cook*, has not been disclosed, and we are unable to judge of its effect on the contract.

But there is a circumstance yet to be noticed, the effect of which I take to be decisive against the plaintiff, be the knowledge and acquiescence of the defendant what they may. An action to recover dower in this tract was brought against *Grant*, by the mother of *Cook*; and, being submitted to arbitrators, came to a hearing in *July*, 1822. *Lemons*, who appeared before the arbitrators, as a witness for *Grant*, distinctly swears, that he and *Grant* entered into a plot to defeat Mrs. *Cook*, by denying the right of her son, who was then dead, to sell; *Lemons* declaring his own intention never to convey. Other witnesses testify, that having appeared as a witness to disprove the estate of *Grant*, he produced his deed, and declared under the sanction of an oath, that he had bought the land, and was determined to keep it. Here, again, we find him acting a part in the business, for his own benefit; for *Grant* would undoubtedly have been entitled to an allowance out of the purchase money, for whatever should have been recovered in the action of dower. But the circumstance, most material to the inquiry, is, that we find him declaring on oath, that he considered the contract at an end. The consequence is, that *Grant* and *Lemons*, having conspired to cheat an innocent person, by repudiating the contract, shall never after set it up against each other. The principle that a sham agreement, or fraudulent representation, though absolutely void as to third persons, is nevertheless binding on the parties, is as old as the law itself. A fine illustration of it, is found in *Montefiori v. Montefiori*, (2 *Bl. Rep.* 363;) a case which bears a striking resemblance to the one before us. In an action on a promissory note, the de-

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defendant was not permitted to show that it had been given to serve the plaintiff's purposes, in a treaty of marriage, by giving him a false credit as a man of fortune, the balance of accounts for which the note purported to be drawn, having no existence in fact; and this because, wherever third persons collusively represent any thing in a light different from the truth, they shall be held to make it good between themselves; or, to use the emphatic language of Lord MANSFIELD, "it shall be, as represented to be." The same thing in effect, was done in *Small v. Brackley*, (2 Vern. 602.) And in *Bell v. Longbridge*, tried before Chief Justice TILGHMAN, at a Circuit Court for Cumberland county, held in June 1807, at Carlisle, a judgment creditor who had delivered to his debtor a written acknowledgment of satisfaction, while the land of the latter was in execution, and before a jury of inquiry for condemnation, was not permitted to allege that his judgment was unsatisfied. The cause was argued by able counsel, who thought proper to acquiesce in the decision. If, then, *Lemons* disaffirmed the contract, to enable *Grant* the more successfully to make a dishonest defence in the action of dower, he is *ipso facto* estopped from affirming the contrary. It seems to me this point removes all difficulty, by superseding every other inquiry; for if the jury shall believe that *Lemons* was the real party, and that he acted the part which is proved upon him by his own confession, and the testimony of witnesses, it would reflect but little credit on the administration of justice, to permit him to recover.

DUNCAN, J., delivered an opinion *contra*.

ROGERS, J., and HUSTON, J., concurred with the Chief Justice.

TOD, J., not having heard the argument, took no part.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JULY 2, 1827.]

ALDRICKS and others *against* HIGGINS and another, Assignees of HIGGINS, surviving partner of DAYTON.

IN ERROR.

A letter of credit under seal is not assignable, so as to enable the assignees of the person who has given credit on it, to sustain a suit in their own names. A letter of credit, authorizing credit to be given to the bearer for any sum not exceeding a certain amount, and binding the writer to pay the amount named or any less sum, as the bearer of the letter may think proper to contract, Does not justify the giving of several credits at several times; and, consequently, the writer of the letter is only responsible for the first credit given.

THE record of this case, returned on a writ of error to the Court of Common Pleas of *Susquehannah* county, showed, that it was

(Aldricks and another v. Higgins and another.)

an action of debt brought by the defendants in error, the plaintiffs below, against the plaintiffs in error, the defendants below.

The nature and circumstances of the case are sufficiently explained in the opinion of the court, which was delivered by

ROGERS, J.—It would be useless to decide whether this action is within the provisions of the statement law of 1806, as the court are clearly of the opinion that the instrument of writing on which the suit is brought is not assignable, so as to enable the plaintiffs to sustain a suit in their own names. It is neither payable to order nor assigns, within the words and intent of the act of the 28th of May, 1715.

This suit is brought upon a sealed letter of credit, in the words following:

“*Hartford, December 12, 1822.*

“To any gentleman in the city of *New York.*

“*Lewis C. Aldricks*, a young man living in this place, having a desire to enter into trade in a small way, and feeling ourselves confident of his well managing the business, we here offer ourselves in security to any gentleman who may feel disposed to give him credit not exceeding seven hundred dollars, to be bound and held firmly by this writing, to pay the said sum of seven hundred dollars, or any sum less, as the said *Lewis C. Aldricks* may think proper to contract. In witness whereof we have hereunto set our hands and seals.

David Aldricks.

John Kingsley.

Freeman Peck.”

On the faith of this letter *Michael D. Higgins*, and *Henry Dayton*, credited *Aldricks* at two several times; viz. on the 3d of May, 1823, and the 17th of December, 1823, for goods, wares, and merchandize, amounting, with interest, to two hundred and seventy-six dollars and sixty-three cents; for which they recovered a judgment against *Aldricks*.

On the trial, the jury gave a verdict for that amount against *Aldricks*, *Kingsley*, and *Peck*, with the costs of the suit against *Lewis C. Aldricks*.

The construction of this letter of credit, is the important part of the case. It was intended as an introduction to business in *New York*, for *Aldricks*; binding the signers in an amount not exceeding seven hundred dollars. It can hardly be supposed that they intended a credit, unlimited in time, for that amount. It would, I think, be unreasonable to give the letter of credit that construction. The principle of this case was fully considered by the Supreme Court of *New York*, in *Teneycke v. Vanderpool*, 8 Johns. Rep. 120, to which I accede.

It results from this, that the defendants would be liable only for the goods which were first furnished by the plaintiffs, on the faith of the letter of credit.

Judgment reversed, and a *venire facias de novo* awarded.

Argued and delivered 27th Dec. 1827.

[SUNBURY, JULY 2, 1827.]

PIPHER and another *against* LODGE and others.

IN ERROR.

A tenant who holds from year to year as a cropper, is disqualified to serve as a juror in a suit to which his landlord is a party.

It is no cause of challenge to a juror that he is the brother of the counsel of one of the parties.

The court, on a bill of exceptions to the admission of a deposition, will inquire whether sufficient grounds appeared to the court below for admitting it.

A deposition was admitted on the ground of inability to attend, and the proof was, that the witness had broken her leg eight or ten years before, and had again been hurt the preceding autumn, but was stout and active, and had a few days before come to within ten miles of the court house; she was not able to walk, nor was it prudent to bring her on such a day unless in a covered carriage, in which she might have been safely brought: *held* that it ought to have been rejected.

A copy of a deposition, no account being given of the original or its loss, and nothing proved but that due search had been made for it, and not stated to be copied from the original, is not evidence.

In a question whether the plaintiff had paid certain purchase money, the defendant gave evidence to show that the plaintiff was insolvent; the plaintiff, to rebut this, offered in evidence the assessment of lands in the names of himself and H., and then offered the will of H., mentioning that lands had been sold by him to the plaintiff, directing that his (H's.) share of the money due, was one hundred pounds, and referring to the plaintiff's interest in another part: *held* that it was improperly admitted.

A tenant's wife is not a competent witness for the defendant in ejectment, where such tenant is in possession of lands described in the statement, and a general defence has been taken.

After a sale of land by articles of agreement and payment of the purchase money, the vendee died, and his wife and children left the land; the vendor placed a tenant on it, and the possession continued in him and those claiming under him, twenty-one years: *held* that it was erroneous to charge the jury that the putting on the tenant was not an ouster, unless they believed that the vendor intended to commit an ouster.

WRIT of error to the Court of Common Pleas of *Northumberland* county, where a verdict and judgment were rendered in favour of the defendants in error, the plaintiffs below.

It was an ejectment brought by *Benjamin Lodge* and others against *William Pipher* and *William A. Lloyd*.

The plaintiffs claimed one hundred and fifty acres of land upon the north-east branch of the *Susquehannah*, which they alleged *Jonathan Lodge*, deceased, purchased of *Reuben Haines*. It was admitted by both parties, that *Reuben Haines*, in his lifetime, was seised of the premises, and both parties claimed under him. The plaintiffs gave in evidence a paper dated the 7th of *December, 1782*, purporting to be a settlement between *Reuben Haines* and *Jonathan Lodge*, and payment, according to an agreement between them in the year 1773, for one hundred and fifty acres of land on a run called "*Lodge's run*," two miles up the north-east branch of the *Susquehannah*, from the town of *Northumberland*. And

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that *Jonathan Lodge*, deceased, under whom the plaintiffs claimed, in pursuance of some contract with *Reuben Haines*, went into possession of the land in 1773 or 1774, and continued to reside on it with his family until his death, which happened in the fall of 1783; soon after which the family of *Lodge* moved into the town of *Northumberland*, and paid no further attention to the land. In support of the authenticity of this paper, dated the 7th of *December*, 1782, the plaintiffs called several witnesses. The defendants gave in evidence a patent to *Richard Peters*, dated the 14th of *September*, 1772; *Richard Peters*, by deed of the 17th of *December*, 1773, conveyed to *Reuben Haines*. And they deduced a regular title to *William A. Lloyd*, the co-defendant; and for a small part to Mr. *Nourse*, who married *Caroline Young*, daughter and heir of Mrs. *Young*. The defendants contended that the paper dated the 7th of *December*, 1782, was a forgery. It was agreed by both parties that *Jonathan Lodge* did contract with *Reuben Haines*, for one hundred acres of land; and that he lived upon it until the fall of 1783, the time of his decease. That after *Lodge's* decease, his family moved into *Northumberland*; and never made any claim to this land, until the bringing of this action. That in 1785, one *Leichler* went into possession under *Reuben Haines*; and those holding under him had continued their possession until the time of trial. And it was alleged that *Jonathan Lodge*, although he contracted with *Reuben Haines* for one hundred acres of land, never paid for it. *David Logan*, a witness for the plaintiffs, had testified, that he saw one hundred and fifty acres paid for in *June*, 1782, by *Lodge* to *Haines*. It was alleged by the defendants that *Logan* was mistaken, and that *Haines* was not here, and the money was not paid.

On the trial, a jury being called into the box, among them were called *James Gaston* and *William Jordan*. The plaintiffs challenged *James Gaston* for cause, viz. that he farmed certain lots for the defendant. Upon inquiry, it appeared, that he farmed certain lots for *William A. Lloyd*, and gave a share of the grain; not where he resided, nor under any lease. It also appeared, that *William Jordan* was a brother of one of the plaintiffs' counsel, and the defendants challenged him for that cause. The court sustained the plaintiffs' challenge to *Gaston*, and overruled the defendants' challenge to *Jordan*: to which the defendants excepted.

John Frick testified, that *Margaret Frick* was in *Northumberland* yesterday; eight or ten years since her leg was broken; she could be brought in a wagon covered; is a stout active woman for her age—not able to walk here. She came from *Milton* on Monday—was hurt again last fall. It would not be prudent to bring her from *Northumberland* this wet day without a covered carriage. On this testimony, the plaintiffs offered the deposition of *Mary Frick*: the defendants objected: the court admitted it, and the defendants excepted.

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The defendants offered to read *James M'Mahon's* deposition, and called *J. Packer*, who swore that he could not say he had particularly searched for the deposition of *M'Mahon*, but had searched for all depositions, and had not found the one sought; and it was admitted that due search had been made to find the original deposition of *James M'Mahon*, taken *June, 1819*. *Charles Donnel*, Esq., swore that a paper offered, purporting to be a copy of the deposition of *James M'Mahon*, was in his handwriting. He supposed that he copied it correctly—but had no distinct recollection of the original. He had some recollection of copying a paper like this. He was clerk in prothonotary *Weaver's* office here in 1821, and part of 1822. He did not recollect whether he copied this from an original or a copy. The certificate of the prothonotary of the Court of Common Pleas, annexed to this record from the Supreme Court in this case, to which the said paper was attached, was read. And thereupon the defendants offered to read the said paper, dated *June, 1819*. The plaintiffs objected, and the court sustained the objection. The defendants excepted.

The plaintiffs, after showing an assessment of lands in *Turbert* township, in the names of *Jonathan Lodge* and *Samuel Hunter*, offered the will of *Samuel Hunter*, dated the 29th of *March, 1784*, to show that Mr. *Hunter* admitted *Lodge* was part owner with him of the lands taxed to *Hunter* and *Lodge* in *Turbert* township, and to rebut evidence of *Lodge's* insolvency; the defendant's counsel objected. The court admitted the will, notwithstanding the defendants' objection, and, at the defendants' instance, signed another bill of exceptions.

The material clause in the will was the following:

"I do hereby order and direct, that the plantation and tract sold by Mr. *Jonathan Lodge*, and myself to *George Dougherty*, that the remainder of the monies due to me, arising from that sale, be appropriated by my executors to, and for the payment of my just debts; my share thereof amounting to one hundred pounds; after deducting the monies necessary for patenting the same: and I do further order and direct, that the plantation and tract of land in *Turbert* township, near, to Mr. *Hewitt's*, taken up by Mr. *Lodge* and myself, be sold by my executors, and the sum of twenty-four pounds and fifteen shillings, paid by me, for warranting the said tract, is to be refunded, and paid by Mr. *Lodge*, or his executors, before he can or may be entitled to any share, and purport thereof."

The plaintiffs offered in evidence the record of an ejectment to *November* term, 1809, *Sarah H. Young et al. v. Burke et al.* in which there was a verdict for the plaintiffs. The defendants objected. The court admitted the evidence, and the defendants excepted.

The deposition of *Ruth Huzzy*, taken in 1822, was offered by the defendants. The plaintiffs objected, on account of the inte-

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rest of the witness, as wife of *Ralph Huzzy*. The court overruled the deposition, and the defendants excepted. *Ralph Huzzy* having been sworn in chief, to prove *Lloyd* in possession, in an early part of the cause, stated, that he was in possession of a field, under Mrs. *Nourse*, formerly Miss *Young*, on this side of *Lodge's* run; might be fifteen or eighteen acres between the lower line of *Lodge's* clearing and the run. *Pipher* was not in possession of Mrs. *Nourse's* part, but was in possession above the run. The court rejected this deposition, and the defendants excepted.

The counsel presented to the court the following points, among others not now material:

3. That putting a tenant on the land is not evidence of ouster, unless the jury should believe, that the party thereby intended to oust *Lodge* and heirs.

Answer of the court.—It is not.

8. That the statute is no bar for all the land recovered in the ejectment, *Young v. Burke*.

Answer of the court.—It is not.

13. That, if the widow, during the time she lived in *Northumberland*, was, at any time, on the land, claiming it for herself and children, this would be an entry, and would prevent the running of the statute; so, likewise, if she took any of the profits of the lands.

Answer of the court.—It would; but there is no evidence that she ever claimed the land after the decease of her husband.

24. If possession was taken by fraud or breach of trust, the statute runs from the time of possession being adverse. If taken in mistake, the statute would not run, before the person in possession showed an intention of holding for himself.

25. He could, if the monies were not paid, have rightfully taken possession.

Answer of the court.—

24. That if the jury believe that possession of this land was taken in fraud, in breach of trust, or in mistake; and the paper, called a receipt, not discovered until the year 1813, or 1814, and is a genuine paper, the plaintiffs are entitled to recover.

25. *Reuben Haines* could not take possession in any other way than as mentioned in the 24th point.

Grier and *Bellas*, for the plaintiff in error, argued the respective points.

1. The challenge of *Gaston*. In case of suspicion, triers must be appointed. The principal challenges alone, are decided by the court. 3 *Bac. Ab.* 748. To justify the latter, the juror must be under the power of the party. *Gaston* was not the tenant of *Lloyd*, or subject to his distress. He did not live on his land, and there could be no distress for this, which is not a rent. 13 *Serg. & Rawle*, 110. There was nothing here but a dealing. He referred to *Cro. El.* 143. 8 *Johns.* 157. 3 *Bl. Com.* 363. *Co. Lit.* 157, 156, n. a. 21 *Vin.* 267. 10 *Serg. & Rawle*, 334. 9 *Johns.* 260.

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2. *Jordan* was not an indifferent juror. Counsel and party are pretty much the same. Sometimes the counsel have greater interest in a cause than the party. *Cowp.* 112. Where a deputy sheriff was of counsel, and summoned his own relations, it was held a good challenge to the array. Relationship to sheriff, in the ninth degree, is good cause. 2 *Plowd.* 425. *Gratz v. Benner*, 13 *Serg. & Rawle*, 110. Counsel cannot draw a deposition, because they are looked on as nearly connected with the party. *Ib.* 405.

Second bill of exceptions.—*Margaret Frick* was in *Northumberland*, and her appearance might have been procured. There was no necessity for reading her deposition. There was no service of a subpoena, or proof that she was unable to attend. 4 *Yeates*, 520. 8 *Serg. & Rawle*, 540. The witness might have been brought.

Third bill of exceptions.—The deposition of *M. Mahon*. The deposition was certified with the record sent to the Supreme Court. A certified copy of a deposition filed, ought to be evidence when the original is lost. We were forced, by rule of court, to file our deposition; we are, therefore, entitled to the benefit of our certified copy.

Fourth bill of exceptions.—*Hunter's will*. We gave evidence that *Lodge* died poor and indebted. The will was offered to show *Lodge* a man of property, and interested in land taxed to *Hunter* and *Lodge*. Declarations are evidence only against those claiming under *Hunter*. It is a recital. *Whart.* 249, pl. 327. *Gallegher v. Rogers*, 1 *Yeates*, 390. 3 *Serg. & Rawle*, 267. 2 *Serg. & Rawle*, 350, 382. 4 *Serg. & Rawle*, 499. 3 *Serg. & Rawle*, 9. 5 *Serg. & Rawle*, 295. 2 *Yeates*, 230, 315. 4 *Yeates*, 295.

Fifth bill of exceptions.—The record in *Young v. Burke* was not evidence, because it was not shown to be for the land in dispute, or that it was relevant.

Sixth bill of exceptions.—*Ruth Huzzy's* deposition was rejected, because it was said she was interested; her husband being in possession of a part of the land in dispute. She was not interested when the deposition was taken, which was in 1822. Her husband speaks of being a witness at *Northumberland*. We are not to be deprived of our interest in a witness, who has become interested, not by our act. They did not show that he came in under us. The court went on the authority of *Irvine v. Reed*, 4 *Yeates*, 512. It does not appear he came in possession in 1822. 2 *Lord Raym.* 1009. *Gold v. Eddy*, 1 *Mass.* 1. A party who becomes interested may use his own deposition, although he may afterwards have become a party. But *Pipher*, against whom the suit is brought, was in possession above the run; and one *Troutman* held below; the witness did not live on land held by *Pipher*. 3 *Johns. Ca.* 234. 3 *Binn.* 311. 1 *Salk. Rep.* 107. The witness becoming interested by his own act, is still competent.

CHARGE.—*First point.*—The court directed that putting a tenant on the land, is not evidence of ouster, unless the jury believe

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there was an intention to oust. The act is not equivocal, or susceptible of explanation. 1 *Serg. & Rawle*, 515. 2 *Serg. & Rawle*, 439. 11 *Serg. & Rawle*, 337. 6 *Johns.* 34. 7 *Johns.* 157. 10 *Johns.* 475.

2. We were in possession of land recovered by us from *Burke*, who was an intruder on us. This is a matter in which they had no concern: *they* were not in possession.

3. There was no evidence of an entry, but that the owner happened to walk over the land while claiming it.

4. The answer to the twenty-fifth point tended to mislead.

Marr, contra.

1. The challenge of *Gaston*. He had a permanent interest in the land, and would have been liable for the taxes, and to distress. A rent need not be in money. 21 *Vin.* 256. It might have been a serious misfortune for this cropper to have been turned off at the end of the year. *Jordan* was incontestibly free from exception.

2. Deposition of *Margaret Frick*. There was no question of her having been subpœnaed. It was a matter of discretion, and not the subject of a writ of error. 4 *Yeates*, 520.

3. Deposition of *James M'Mahon*. There was no proof that the deposition was taken on notice.

4. *Hunter's will*. Testamentary admission of property belonging to an individual, is substantially a devise. We gave evidence to show considerable property was taxed to *Hunter* and *Lodge*; and, for the purpose of showing *Lodge* was really a partner, we produced the will of *Hunter*. They might have said that although the warrants were in the name of both, they were not owned by *Hunter*.

5. Deposition of *Ruth Huzzy*. Her husband might have been turned out. He was within the limits of our description and writ. *Lloyd* and wife were made defendants on motion. If the witness could not be examined, the deposition could not be read. 4 *Yeates*, 572.

Charge. The mere act of going on the land is nothing; the intention is the main matter. An entry may not be an ouster; but less than an entry, which would bar the statute, cannot be an ouster to make it run in favour of him who entered. *Haines* may have entered to support the estate of the *cestui que trust*. Presumption is against illegality, and that a man is not a trespasser. *Co. Lit.* 245, *a. and b.* *Vide* 6 *Johns.* 218. 9 *Johns.* 167. 1 *Johns.* 156. 2 *Johns.* 230. *Salk.* 423. The ejectment in *Young v. Burke*, proved they had not taken possession of the land. They do not show how *Burke* held; and the presumption is, he held under us: that is, that he held by right.

GIBSON, C. J.—A tenant who holds from year to year as a cropper, is indisputably disqualified as a juror, in an action to which his landlord is a party; and tenure on such terms, is a principal

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cause of challenge. Whether the landlord may distrain or not, (about which I intimate no opinion,) the relation is intimate, and one of dependance. He may by the mere exercise of his will determine the tenancy, and deprive the cropper of his contract, who therefore cannot stand indifferent; and the juror who was in this predicament was properly set aside. On the other hand, the juror, who was brother to one of the counsel, was notwithstanding properly sworn of the panel. The counsel may have had no personal interest in the event; but, if any thing of the sort had been shown, such for instance as a contingent fee, it would have afforded ground for a challenge to the favour which with us is decided by triers in the court, at the option of the parties. I have known a sheriff to have a brother at the bar; but no one thought of that as a cause of challenge to the array. The case of a brother to one of the counsel in whom a particular interest is not shown, would seem to be referrible to the peremptory challenge provided in civil cases by the act of assembly.

I am of opinion, the deposition of *Margaret Frick* was improperly admitted. In cases of secondary evidence, the question whether a sufficient introductory ground was laid, has always been treated in courts of error as a proper subject of discussion. In *Lamberton v. Sanderson*, (3 Binn. 192,) this court reversed the judgment, because the court below had rejected evidence of an obligor's handwriting, although evidence had been given that the subscribing witness was out of the jurisdiction; and, that after *diligent inquiry* no person could be found to prove his signature. So a question of what was *reasonable notice*, where no particular time was specified in the rule, was entertained in *Hamilton v. McGuire*, (2 Serg. & Rawle, 478,) and the same principle was involved in *Sweitzer v. Meese*, (6 Binn. 500,) and, also, in *Carpenter v. Groff*, (5 Serg. & Rawle, 162,) where the decision of the court below was overruled. There is an endless list of other cases where a court of error will inquire into the sufficiency of introductory evidence; as, for instance, of the existence, loss of, and search for deeds or other writings; of the notice to produce them; of evidence of interest, on an objection to a witness; or evidence of the execution of deeds or writings offered in evidence collaterally: and many other cases, which at present do not occur to my recollection. Whatever, therefore, may be our opinion of the expediency of entertaining questions of this sort, it is too late to remit them to the discretion of the courts below. Nor would I be disposed so to remit them, if that were still open to us. Of the truth of preliminary evidence, the court to whom it is given are peculiarly qualified to judge; and I shall always hold myself bound by every conclusion of fact drawn by the court below; but whether the evidence, if believed, make out a case to bear out the decision, is a conclusion of law which I am competent to draw for myself. A deposition is, unquestionably, but secondary evidence,

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and admissible on proof of its having been taken under a competent authority, on due notice, and in a proper manner: and, also, on proof that the contingency, for which it was intended to provide, *has actually* happened: and, if it be admitted without this, it is error. Here the objection was to the proof of inability to attend, which was, that the witness had broken her leg eight or ten years before, and had again been hurt the preceding autumn; but that she was a stout active woman of her age, and had come from *Milton to Northumberland* a few days before; that she was not able to walk to court, nor would it have been prudent to bring her from *Northumberland* on a wet day, such as that on which the cause was tried, unless in a covered carriage, in which she might have safely been brought. This is an accurate statement of the proof: by which it appears she was able to travel ten miles on the preceding Monday; was within two miles of the court house during the trial; and might have been brought to court during the same day in a close carriage. Was this a sufficient cause to dispense with her attendance? Every one of the least experience knows the immeasurable superiority of oral over written testimony, and the benefit of a cross-examination in the face of the court, during which the eyes and the ears of the jurors may, with equal advantage, be employed in the discovery of truth. Of these advantages nothing ought to deprive a party but absolute necessity, either physical or moral. In an inquiry involving the charge of forgery, or, at the least, the imputation of moral turpitude on the one side or the other, and, in a very mysterious transaction such as this, an opportunity to probe the witnesses and sift their testimony, is of inestimable value; nor ought it to be refused, to suit the mere convenience of a party. It rained during the trial; but, in the case of a witness who might be prevented from attending by bad weather on the day, ought not the party to have had forecast enough to bring her to the seat of justice while the weather was fair, even before the day? But the badness of the weather was in fact no obstacle, or at least a very slight one; nor ought the plaintiff to have been absolved from his duty, for the alleged inconvenience in procuring a close carriage. For myself, I believe he was guilty of gross negligence, and that the consequences of it ought to have fallen on himself.

The copy of *James McMahon's* deposition, it seems to me, was properly rejected. No account was given of the original, or of its loss, and nothing proved but that due search had been made for it. Beside, the introductory evidence is particularly defective in not showing the paper to have been copied from the original: nor was there the usual ground laid to make way for the original itself, had it been produced.

But, it seems to me, *Samuel Hunter's* will ought not to have been admitted. I do not question the competency of declarations by deceased persons, which were made in prejudice of their inter-

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rests; but is that the case here? The defendant had given evidence to show that *Lodge* was insolvent, and the consequent improbability of his having paid the purchase money; and the plaintiff offered the will of *Hunter* to show his admission that *Lodge* was joint owner with him of certain lands, taxed in the names of *Hunter* and *Lodge*, and to rebut the evidence of insolvency. The part of the will which is material to the question, is in these words: "I do hereby order and direct, that the plantation and tract of land sold by Mr. *Jonathan Lodge* and myself to *George Dougherty*, that the remainder of the monies due to me, arising from the sale, be appropriated by my executors to and for the payment of my just debts; *my share thereof amounting to one hundred pounds*: and I do further order and direct, that the plantation and tract of land in *Turbert* township, near to Mr. *Hewit*, taken up by *Lodge* and myself, be sold by my executors, and the sum of twenty-five pounds fifteen shillings, paid by me for warranting the said tract, *is to be paid by Mr. Lodge*, or his executors, before he can, or may be entitled to any share or purpart thereof." It is difficult to understand how a declaration, that the party's share of the price of a tract of land sold by him and another, is a hundred pounds, or that the other is indebted to him for a share of the expense incurred in procuring the title to another tract, can be said to have been in prejudice of his interest. It is said to be so, because, by acknowledging the interest of the other, he releases his grasp on the whole. But does it appear that the whole was within his grasp? There is no sacrifice of interest in renouncing a claim to property which all the world knows belongs to another. Should A. declare that B. is seised to his own use, and not in trust for C., such a declaration would not be evidence against C., on the supposition of its having been made with a view to the remote and unexpected contingency of a contest for the property between A. and B. In the case before us, it does not appear that the title was in the name of *Hunter*, but it would seem, from the land having been taxed as the property of both, that the title stood in the names of both, and there does not seem to have been colour of claim, or a pretence for it, by *Hunter* or any one else. And we cannot shut our eyes to the real object of the evidence, which was not to show disclaimer by *Hunter*, but to show the value of the property, and that there was an available fund of a hundred pounds within the power of *Lodge*. The evidence was offered, not merely to show the disclaimer; but, in express terms, to rebut the evidence of insolvency: and it was indisputably not competent to show the value of the property. But in no aspect will the case justify a further relaxation in this respect of the common law, one canon of which requires that testimony by witnesses be under the sanction of an oath; for which a possible sacrifice of interest is an imperfect, if not a dangerous, substitute.

I am of opinion that the deposition of *Ruth Huzzy*, also, ought

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to have been admitted. The objection is, that her husband came into possession of a part of the premises under the late Mrs. *Young*, since intermarried with the defendant, Mr. *Lloyd*, and might, it is said, be turned out in the event of a recovery. To understand this, it is necessary to bear in mind, that the action was originally brought against *Pipher*, for land which lies in the end of a survey whose general figure is that of a parallelogram; the whole of which was in the possession of Mrs. *Young*. The premises are described in the writ as one hundred and fifty acres, or thereabouts, bounded by persons whose lands adjoin the end and two sides of the parallelogram; but without designating any boundary between the premises and Mrs. *Young*'s other land. It was proved by *Huzzy*, the husband of the witness, and the only person who speaks of his possession, that *he holds no part of the premises leased to Pipher*; and, consequently, no part for which the action was originally brought. The cause was first tried while *Pipher* was the only defendant, and with no other description than that contained in the writ; then the plaintiff filed his statement, describing the land by definite boundaries, and including the possession of *Huzzy*, in addition to that of *Pipher*; and, lastly, Mr. *Lloyd* and his wife, late Mrs. *Young*, were admitted to defend as landlords. Now, the plaintiffs' right of action is not enlarged by the coming in of the landlord, who is made defendant only as regards the lands sued for; because a different rule might subject the tenant to an action for mesne profits which he never received, or for a trespass which he never committed. The plaintiff, therefore, could recover no lands but those that were in the possession of *Pipher* at the commencement of the action; and, so far was he from proving *Huzzy* to be in possession of any part of what was leased to *Pipher*, that *Huzzy* himself, the only witness who speaks of the matter, explicitly proves the reverse. According to this view of the subject, *Huzzy* was not interested, and his wife was a competent witness. But it is said, the sheriff's return of service is made evidence, by the act of 1807, of the defendant being in possession; and that this extends to all the lands included in the description. If this be so, a plaintiff, by enlarging his description, can exclude the testimony of all the landlord's tenants who happen to reside within the county. But I think I may confidently assert, that no one can be turned out on a judgment against the landlord, who could not have been turned out on a judgment exclusively against the tenant; the subject matter of the action undergoing no change by adding the landlord, whose privilege would be a barren one, were the exercise of it to subject him to an increase of responsibility. Granting, then, that the sheriff's return is evidence that *Pipher* was in possession of all the lands included in the description, still *Huzzy*, not having come in under him, could not be turned out on the judgment. But was it the intention of the legislature to declare the defendant, at the return of

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the writ, to be in possession of all the land described, to all intents, and for every purpose? Under the old practice, the mischief was that the plaintiff was often nonsuited after having shown title, for want of proving what was merely the formal part of his case, a trespass on any part of the land; without which the defendant could not be driven to a defence on his title. But it was not necessary to prove the defendant in possession of all the land described in the declaration; it was sufficient to prove a trespass on any part of it. Neither necessity nor convenience, therefore, requires the construction of the act to be carried further than the particular mischief intended to be remedied. But, admitting that for the purpose of putting him to proof of his title, the defendant is to be taken to be in possession of all the land claimed, is he to be considered so for any other purpose? Undoubtedly the legislature never intended by this provision to interfere with questions of competency depending on interest; nor ought the law to have that effect.

Errors are assigned also in the charge, one of which I take to be fatal.

The jury were directed that the possession taken by *Reuben Haines* in 1783, by putting a tenant on the land after the widow of *Lodge* had abandoned the premises, was not evidence of an ouster, unless they should be of opinion that *Haines* intended to commit an ouster. The argument in support of this is, that he was a trustee for *Lodge's* heirs; and that until the contrary distinctly appear, the law will intend that he entered not as an enemy, but to preserve the inheritance in their absence. A vendor in possession, is a trustee by implication of law; but nothing is better settled than that the statute of limitations runs in the case of an implied trust. When this cause was before us on a former occasion, I expressed an opinion on this subject, (4 *Serg. & Rawle*, 569,) which I see no reason to retract. But is there even an implied trust when the purchase money has been paid, and the possession delivered? By the very terms of the contract the seller is to have nothing further to do with the possession; and, if he is a trustee of any thing at all, it is of the title which he holds subject to the call of the purchaser, and with which alone he can have any concern. If, indeed, any part of the purchase money were unpaid, his entry might be referred to a motive which would legitimate the act, and entering only to enforce a compliance with the contract, he would hold in trust for the purchaser, after the purchase money should be paid. But here the suit itself, without a tender, is an assumption by the plaintiff of the very fact of payment. What was it to *Haines* that the premises had been left vacant? He was called upon neither by duty nor interest, to resume the possession. He was a trespasser against the owner, just as any other person would have been, in putting a tenant on the land. The statute of limitations is most beneficial in its consequences,

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even as regards honesty and fair dealing, and no judge or juror who has a proper regard for his duty will be deterred from giving it its full and fair effect, by the supposed hardship of its operation in the particular instance. This is a matter in which the community has an immense stake; for where a party is base enough to have recourse to perjury or forgery, after those who could have shown the truth of the case have passed away, there is no other hope of salvation: when that fails, the innocent man is delivered into the hands of his adversary, bound hand and foot.

The remaining exceptions to the charge, that the defendants were not protected by the statute in regard to the land recovered from *Burke*, and that an entry by Mrs. *Lodge*, while she resided in *Northumberland*, would stop the running of the statute up to the period of the entry, are not sustained. From aught that appears, *Burke* may have held under the plaintiffs: at all events, it was not shown that he or any one else held this part of the premises adversely for twenty-one years. The *direction* as to the effect of a supposed entry by Mrs. *Lodge*, was technically correct, and we are not to suppose that its bearing on the cause, was not comprehended by the jury. The last exception is to a part of the charge which was favourable to the defendants, who cannot, therefore, assign it for error. For these reasons, I am of opinion that the judgment be reversed.

ROGERS, J.—It is unnecessary for me to notice the first bill of exceptions, except by stating my concurrence in the view taken of it by the Chief Justice.

The Court of Common Pleas, in the exercise of a sound discretion, admitted in evidence the deposition of *Margaret Frick*. Without undertaking to say positively what my opinion would have been, had I tried the cause, (and in all probability it would have been the same as the Court of Common Pleas,) I do not think myself at liberty to reverse the decision of the court in receiving this evidence. We should be cautious in reversing for such errors; for there is much danger, by so doing, of injuring the wholesome administration of justice. It is impossible that the parties can put on the record a number of circumstances which properly influence the mind of the court. A knowledge of the witness, the conduct of the party and his counsel, going to show the danger or propriety of this secondary evidence, will, and ought to have their due weight. We should cramp the usefulness of the Courts of Common Pleas, unless we allow considerable latitude to their legal discretion in the rejection or admission of such testimony. To suppose that we can determine this matter better than the court who try the cause, is to believe that without light and knowledge we can re-judge their justice with all the circumstances which necessarily attend the trial of issues before their eyes, and with a knowledge which we cannot have of the conduct of the parties, witnesses, and

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counsel. I will not say, that this is not assignable for error, but this I will say, that it behooves the party wishing us to reverse on this ground, to bring a very strong case before the court.

Experience, it is true, has taught us, that *viva voce* testimony is in general better than depositions; but by the same means we also learn, that the free and liberal use of depositions tends to expedite causes, and in some cases, and for some things, is at least as good a mean of eliciting truth. It should be guarded, but not put under unnecessary restrictions.

Frequently depositions are used to prove the attestation of a witness to deeds or other instruments of writing, or perhaps a single fact, which, if there had been any ingenuousness in counsel, would have never been denied. There is no danger in saying that the court will consider all the circumstances connected with the case, the importance of the deposition, and will, from a view of the whole, determine whether injustice be done by substituting the deposition for the examination of the witness at the bar of the court.

In this case the deposition was not an important one. Mr. *Lloyd* cross-examined the witness, and there is not the slightest reason to believe that he was injured by the reading of the deposition in place of a *viva voce* examination. He made a general objection to the deposition, with a wish, perhaps, that it might be admitted, and that he might have cause of reversal, in case the verdict of the jury was in favour of the defendant. It appears the witness was eighty years old, the weather unfavourable, a reason which the judge felt, and which we cannot at this distant day, and with this pleasant weather, fully appreciate.

I agree with the Chief Justice, in the rejection of the deposition of *James M'Mahon*.

In the course of the trial, the Court of Common Pleas admitted the will of *James Hunter* in evidence, and this has also been assigned for error. It was deemed important by the plaintiffs and defendants, to prove the circumstances of *Jonathan Lodge*. The defendants endeavoured to prove, that *Lodge* was poor; the plaintiffs that he was fully able to pay the sum of money which they alleged he had paid. For this purpose, the plaintiffs, among other things, showed that certain lands had been assessed in the name of *Samuel Hunter*, and *Jonathan Lodge*, and then offered the will of *Hunter*, in which he declares that the lands so assessed in their joint names, was in truth owned by them, as tenants in common. The will is dated the 29th of *March*, 1784, and proved the 21st of *June*, 1784; and be it remembered, that the receipt of *Reuben Haines* to *Jonathan Lodge* is dated the 7th of *December*, 1782. This evidence was then pertinent to the matter in dispute, which turned on the payment of the money, for which they produced *Haines's* receipt.

The proof of the state of a person's pecuniary affairs is general in its nature, and cannot with any propriety be subjected to the

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strict rules of evidence; and this was decided a tour last session in *Chambersburg*.

The usual testimony in a court of justice, in such cases, is reputation, the opinion of neighbours, a general estimate of the value of the property. You may, to be sure, inquire more particularly, as, whether he was owner of a particular piece of property; but it never was required, that you should show a bill of sale for his personal property, or the title deeds of his real estate. It is upon a principle of convenience that courts of justice have, in such cases, dispensed with the strict rules of evidence. The expense and trouble would be intolerable. Good sense, and an attention to the ordinary concerns of life, have led to the practice of receiving such testimony without objection. Necessity, either moral or physical, and, I may add, general convenience, dispenses with the ordinary rules of evidence.

It is admissible on another principle. It is the assertion of a fact, contrary to the interest of *Samuel Hunter*, that *Jonathan Lodge* was the owner of a moiety of this tract of land. It is a rule of evidence, founded on the best sense, and knowledge of human nature, that a memorandum, made in the ordinary course of business, which charges the person making it, may be given in evidence to prove that fact, in a suit between third persons; as where a steward makes a charge against himself, it is evidence, in a suit between his employer and a third person. There is no danger in such testimony; and particularly, when, at the time of the entry, there was no dispute between the parties. The attention, which we all naturally pay to our interest, leads us not to charge ourselves unless we ought to be charged. It is received in evidence, for as much as it is worth; and it is sometimes evidence of the most conclusive nature. 1 *Stark. Ev.* 69, 70, 71.

I concur with the Chief Justice, that the record of the suit of *Sarah H. Young v. Burke*, was properly admitted.

It appears from the writ, that this ejectment was brought against *William Pipher*, the tenant of *Sarah H. Young*, for a tract of land situate in *Point* township, *Northumberland* county, containing one hundred and fifty acres, or thereabouts, bounded by lands of *Thomas Grant* and others. At the time the suit was instituted, *Sarah H. Young* was in the possession, and sole owner of the whole property. *Pipher* was in the actual possession of one hundred acres, and no person on the remainder. There can be but little question, that it was the intent of the plaintiff to bring suit for all the property above and below *Lodge's* run; and the writ is sufficiently general to include the whole. The objection is, that *William Pipher*, being in possession of only one hundred acres, there can be a recovery in this ejectment, only co-extensive with his actual possession; and this would be true, were it not for what subsequently took place. *Sarah H. Young* afterwards intermarried with *William Lloyd*, and conveyed the property on

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which *Pipher* resided to him; and, upon his death, the remainder descended to his daughter *Caroline*, who intermarried with *Nourse*. The 30th of *August*, 1816, a particular description of the land was filed under the act of assembly; to which, in the lifetime of *Sarah H. Young*, there was a general defence taken. This, it is admitted, embraces all the lands above and below *Lodge's* run. If the defendants intended to take defence, only for the part in the possession of *Pipher*, they might have done so. Having taken defence generally, it applies to the statement, and not to the writ, and they cannot be permitted to say, that the suit was only for that part of the land in the actual possession of *Pipher*. A recovery in this ejectment, will authorize *Lodge* to turn out every person in the possession of the land embraced by the statement.

If this should be the case, then there can be doubt that *Ralph Huzzy* was the tenant of *Caroline Nourse*, and her husband would be interested in preventing the recovery of the plaintiff. He would not be a witness to support his possession, and, if he cannot be examined, neither can the testimony of his wife, *Ruth Huzzy*, be received. But it is said, that her deposition being taken, at a time when her husband was not interested, makes the distinction. Without entering into an examination of the general doctrine on this point, there is one consideration which, with me, is decisive. *Ralph Huzzy*, the husband, became interested as the tenant of *Caroline Nourse*, after his wife's deposition was taken. It was the act of one of the parties in interest, in this action of ejectment. To permit a deposition, under such circumstances, to be read, might be productive of great abuses. It would lead to trick and artifice, which should be carefully guarded against. They would have it in their power to secure the reading of a favourable deposition, by causing the witness to become a party in interest in the suit.

There have been several exceptions taken to the charge of the court; one of which I shall proceed to notice, dismissing the others, with the single observation, that, after an attentive examination, I concur with my colleagues, that the court are not in error.

The Court of Common Pleas, in their answer to the third point of the defendants' counsel, say, "That the putting a tenant on the land is not evidence of ouster, unless the jury should believe that he thereby intended to oust *Lodge*, and his heirs." On this point, I have the misfortune to differ from my brethren, and it becomes me to assign the reasons for the opinion I have formed.

The charge of the court is grounded upon the fact, that *Jonathan Lodge* had paid the whole purchase money for the land. The verdict of the jury has fixed this, and I have thought it but right for the defendant, to give him the benefit of this fact; for, without it, there is no pretence there was error in the charge of the court. The question, then, is, the money, (that is, the consideration for the land) being paid, whether the putting a tenant on

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the land, by *Reuben Haines*, is evidence of ouster, unless the jury should believe he thereby intended to oust *Lodge* and his heirs. Is it *per se* evidence of ouster, and would the jury, in the absence of all other proof, under the circumstances of this case, be bound to say, that by that act he had ousted *Lodge* and his heirs? After the death of *Jonathan Lodge*, Mrs. *Lodge*, with her minor children, moved into the town of *Northumberland*, and left the lands on which the family had resided vacant; and *Reuben Haines* took possession by putting a tenant on the premises. It is an important part of this case, that the land had been purchased by *Lodge* from *Haines* for a price equal to its value, and that this has been fairly paid. In what situation, then, does *Reuben Haines* stand towards the minor children of *Lodge*? In the character of a trustee, doubtless. In *England*, and in those states where they have a Court of Chancery, an action of ejectment, against a stranger, would be brought in the name of the trustee, in whom is vested the legal title. In *Pennsylvania*, from necessity, the *cestui que trust* may sue in his own name; but I believe it will hardly be doubted that the suit would be properly brought in the name of the trustee, the owner of the legal interest. 1 *Dall.* 72.

If a stranger had entered into the possession, *Reuben Haines* could have maintained ejectment, and recovered by virtue of his legal title. It would have been no answer to the action, that the equitable interest was in *Lodge's* heirs.

If, then, *Reuben Haines* had recovered the possession from a stranger, the legal intendment would have been, that he recovered for the use of the owners of the equitable estate. I hold these principles to be incontrovertible.

Here he enters upon a vacant possession, by means of his tenant's standing as the case supposes, in the relation of trustee to the minor children, whose father, in good faith, had paid the full value of the land; it would be a want of common charity to say that he entered in hostility to their right. It would have been an impeachment of the bounty of *Haines*, that, with a knowledge of all the circumstances, he entered for himself alone, and not for the protection of their rights. If, on his entry, a suit had been brought against him as a trespasser, could it have been sustained? Might he not have complained, "It is singular that you should pursue me as a trespasser, who have the legal right, and in virtue of which I entered, to protect a vacant possession as your trustee, and not with the dishonest intent which your action supposes, of holding the money and the land." With a defence of this kind, he would have stood on high ground, and it would have been difficult to have resisted such a plea; the legal intendment always being, that he enters by right, and not by wrong. If the act be equivocal in its nature, the presumption is, that it is in accordance, and not in hostility to the true owner. This is, as has been well expressed, the benign and legal intendment of the law. 6 *Johns.* 216.

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We are not without authority to sustain these positions, which I should have no hesitation in adopting, had the principles come for the first time before the court.

LORD COKE, *Co. Litt. sect. 401, 245, b.* says, "If a bastard invite the mulier to see his house, and to see his pictures, &c., or to dine with him, or to hawk, hunt, or sport with him, or such like, upon land descended, and the mulier cometh upon the land accordingly, there is no interruption, because he comes in by the consent of the bastard; and, therefore, the coming upon the land can be no trespass; but, if the mulier cometh upon the ground of his own head, and cutteth down a tree, and diggeth the soil, or take away profit, there shall be interruption; for, rather than the bastard shall punish him in an action of trespass, the act shall amount in law to an entry, because he hath a *right of entry*. So it is if the mulier put any of his beasts into the ground, or command a stranger to put in his beast; these do amount to an entry; for albeit, the mulier doth not use any express words of entry, yet these and such like acts, done with any words, amount in law to an entry; for acts without words may make an entry, but words without an act cannot make an entry. *Co. Litt. 245, b. sect. 401.*"

I have made this extract from LORD COKE, the highest authority, for the sake of the principle immediately applicable to this point: That the legal intendment is, that the entry upon a vacant possession shall be adjudged in the pursuance of a right, and not in the commission of a wrong. I have endeavoured to show, that *Reuben Haines* had a legal right of entry. The application of the principle is then most obvious.

As this authority is somewhat ancient, it may perhaps add to the force of the principle, that it has been adopted in a modern case, which appears to have been elaborately argued and well decided. "A peaceably entry," says Chief Justice KENT, (6 *Johns.* 216,) "upon land *apparently* vacant, furnishes *per se*, no presumption of wrong." The benign and legal intendment is otherwise. According to LORD HOLT, (1 *Salk.* 246,) a bare entry on another without an expulsion, makes such a seisin only, that the law will adjudge him in possession that has the right. This court has frequently recognized the same rule, that an entry not appearing to be hostile, was to be considered an entry under the title of the true owner. It lay then with the plaintiff, to show his entry congeable, or to show a subsequent seisin, for he entered upon vacant land.

If *Reuben Haines* stood in the relation of trustee; the above authorities conclusively prove, that his entry would not be a trespass; but it would be held that he entered by virtue of a right, nay a duty which devolved upon him to protect the interest of *Lodge's* heirs. If then his entry was to protect their rights, his subsequent occupation, by means of a tenant without more, will partake of the same character. It must be hostile in its inception, and so continued for twenty-one years. 12 *Johns.* 368. 9 *Johns.* 165. It will be in

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accordance with his original entry, and not *prima facie* hostile; and this is what the learned judge has decided, and nothing more. He says in effect, that the mere act of putting a tenant on the land, will not be evidence of ouster; but that if the jury believe that he thereby *intended* to oust *Lodge* and his heirs, it will.

In order to bar the recovery of the plaintiff, who has title by a possession in the defendant, strict proof has always been required, not only that the trust possession was taken under a claim hostile to the real owner, but that such hostility has been continued by the succeeding tenants. *Brandt v. P.* and *D. Ogden*, 1 *Johns. R.* 158.

Adverse possession, so as to defeat the conveyance of the true owner, must be made out clearly and positively; and, to constitute an adverse possession, it must be adverse in its commencement, and so continue. 9 *Johns.* 168, 9. *Jackson v. Sharp*, 8 *Johns.* 280. 9 *Johns.* 165.

The doctrine of the court, with respect to adverse possession, is, that it is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favour of possession in subordination to the title of the true owner. The possession cannot be considered adverse, if the original entry is not to be so considered. 12 *Johns.* 368.

The act relied on as evidence of ouster, should be unequivocal, that the opposite party may have notice that he intends holding the land by an adverse title. When possession is taken under colour of right, they may consider it as continuing clothed with the same character, until the contrary is most clearly and manifestly shown. *Reuben Haines* having entered as a trustee, the act of putting a tenant on the land, is not, in my opinion, evidence of ouster, unless the jury shall believe he thereby *intended* to oust *Lodge* and his heirs.

As this cause will be ordered for a new hearing, I would not wish to be understood, as expressing an opinion on the facts of the cause. I have considered it as a mere abstract question of law, arising on the charge of the court, and the verdict of the jury.

TON, J.—The rejection of Mrs. *Huzzy*, as a witness for the defendants below, was right in my opinion. The fact of interest was disputed, whether *Huzzy's* tenancy was included in the writ. But it was clearly included in the plaintiffs' description filed: and on that description a general defence was taken, and issue joined. Supposing it to be doubtful, whether *Huzzy*, the husband of the witness, could be turned out of possession on the recovery of the plaintiffs in the ejectment; yet, that very doubt, would perhaps be sufficient to exclude a witness, who pending an ejectment, comes by his own act, and by consent of the defendants, into the situation in which *Huzzy* was placed as tenant of part of the land claimed.

The defendants, on the trial, offered in evidence a copy of the de-

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position of *James M'Mahon*, taken before *William Reed*, esq., a justice of the peace, who in it certifies the same to be taken in the presence of *Jonathan Lodge*, one of the plaintiffs below. There also appears in it a cross-examination of the witness by *Lodge*. The evidence was rejected by the court. The copy had been made out by *Charles Donnell* in 1821; and that copy, together with the other papers and records in the cause, some of them copies and some originals, prepared for a removal of the cause to the Supreme Court, all connected together, were authenticated in the usual manner by one certificate at the end of the collection, by the prothonotary under his seal of office. Mr. *Donnell* being sworn on the trial, stated to the court that he was clerk in the office at the time, and that the copy produced was in his hand-writing. He said, that he would suppose he copied it correctly, but had no distinct recollection of the original. He had some recollection of copying a paper like this, but did not remember whether he made the copy from an original or from a copy. By a rule of the court below, all depositions in a cause are directed to be filed in the office by the first court after they are taken, otherwise they are not to be read. The copy produced has no entry in it, or upon it, showing the original to have been filed in the office. It is alleged, and appears to be conceded, that depositions thus lodged in the office, are often misplaced, and sometimes lost. The witness, *James M'Mahon*, has since died. It is admitted on the record that all due search had been made for the original.

Now there appears no pretence of suspicion, that the paper was not correctly copied, and the record honestly made out. Had the deposition been lost by the party out of his own custody, it might have been a different question. Here the paper has been taken from him, and placed in the office by authority of a rule of court. As to the supposed insufficiency of *Donnell's* testimony, it might not have been practicable for him to swear more particularly to any copy made out by him during his clerkship. He supposes that he copied correctly. No honest man can say more after he has forgotten both the copy and the original. It never was required of a clerk in a public office to preserve for years a remembrance of the papers which he has been employed in transcribing. But he could not swear whether it was an original paper he copied from, or a copy only. That, I think, ought to weigh nothing. When he had forgotten, or nearly so, the very fact of transcribing, it is of very little moment that he cannot remember what paper he transcribed from; whether from original or a copy. Clearly the paper must have been considered at the time as an original. It must have been copied as an original, and certified as an original; for, if not an original, it was no part of the record, nor fairly annexed to the record. Besides, what had a copy to do in the office? We can easily see why the original was there, because, unless filed by the first court, it could not be read in evidence. I do not rest

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my opinion on the oath of *Donnell*. Had there been nothing but the seal of office and the hand of the prothonotary, the copy would, in my opinion, be legal evidence under the circumstances of this case; the witness being dead, and the loss otherwise irreparable. The court therefore ought, I think, to have admitted the evidence, subject only to such exceptions as would have been applied to the original.

Nor am I convinced of the correctness of that part of the charge to the jury which respects the statute of limitations. I agree with the counsel of the defendants in error, that we ought to consider words used by the judge, not as laying down a general system, but as only applicable to the matter trying, and to the particular facts in evidence: and that it is not our business to be searching for little slips made in the hurry of a jury trial, in order to reverse a judgment. Yet it strikes me that any misconstruction of the most important, perhaps, of all the statutes of the commonwealth, that of limitations of suits for land, a misconstruction which, if it once gets footing, may be productive of much uncertainty, must not be permitted to have the sanction of this court. On this act of assembly, the counsel of the plaintiffs below required of the court to charge the jury in point of law, that the putting of a tenant on the land (by *Haines*,) is not evidence of ouster, unless the jury should believe that he, *Haines*, thereby intended to oust *Lodge*, and his heirs. The court in their charge to the jury, answered this matter unqualifiedly in the affirmative. By this the counsel for the plaintiffs in error say, that the jury were misdirected, and taught to believe that as to the lapse of time, whether longer or shorter, it was quite immaterial; that to the jury, ten, twenty, thirty, or forty years, was the same thing; that the time fixed by the act of assembly was not the rule, but the jury could absolve themselves from the obligations of the law by the easiest process in the world, by the conjecture of an intent, that is, by intendment now of the intent of a man forty odd years of age, without the least regard to evidence or probability as to matter of fact. For I understand it to be a point conceded, that if there had been any proof in the cause, either direct or presumptive, tending to show that *Haines* entered for the benefit of the *Lodge* family, and not for himself, the direction of the court would have been correct, resting upon, confined to, and leaving the jury to judge of the facts.

The evidence given in the cause being all sent up with the writ of error, it appears that *Reuben Haines*, in 1782, by writing signed by him, acknowledged the sale of the land in question by him to *Jonathan Lodge*, describing the land accurately, and confessing the receipt of the purchase money. This paper was alleged by the defendants below to be a forgery; yet, whether genuine or not, was a mere question of fact; and the jury by their verdict for the plaintiffs below, confirmed by the judgment of the court, have settled the fact of this written transfer, and it is now,

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upon this hearing, incontrovertible. The residue of the facts in the case do not appear to have been much contested, nor to have been very doubtful as far as regards any point now in discussion. A few of them must be taken into view, in order to understand the point in question. That *Jonathan Lodge* died in 1783, about ten years before which time he had purchased the land of *Haines* by parol contract upon credit, there was abundant evidence on both sides; and that not long afterwards, his widow, with her children, the plaintiffs below, left the land, and removed about two miles from it into the town of *Northumberland*. What was the age of *Jonathan Lodge's* youngest child at the time of his father's death is not fixed precisely; some of the witnesses say three, some four, and some five years. The difference is immaterial. Not long after the removal of Mrs. *Lodge* with her children from the land, *Haines* took actual possession by a tenant; and the proof appears to be that from the time of taking possession, *Haines* and his devisees, by a succession of tenants, kept actual possession undisturbed by any suit or claim, as far as appears from this record, until the year 1814, when his ejectment was brought. If then the youngest child of *Jonathan Lodge* came of age in the year 1800, allowing him ten years more according to the provisions of the act of limitations, he should have brought his suit in or before the year 1810; so that he was four years too late, unless something could be made out from the facts in evidence to warrant an exception from the positive words of the law. The rest of the plaintiffs below, in proportion as they were elder, were still further out of time in their suit. Now, on this whole matter, I take the rule of law to be that a trust is never to be presumed, but always to depend upon some evidence. It may be worth while to state that I am not disposed by any means to concede the point, that if *Haines* did, as contended for in the argument, actually enter upon the land as trustee, that his devisees would not be protected by the statute. But I am not going to make that matter any part of the case in my consideration of it, because, taking the case as it appears by the record, there is not, to my apprehension, any evidence, nor the slightest presumption, that *Haines* took possession of the land as trustee for the family of *Lodge*. There was no relationship between them. There was no reason for his interfering, as trustee, that I can discover. It was not a sort of property which required to be specially guarded from injury in the absence of the owners. Throughout the evidence there appears not the least semblance of proof of declaration by *Haines*, that he took possession or held possession for the sake of *Lodge* or his family, but the direct reverse. In his conduct, in his words, there appears not any the least recognition, nor the remotest allusion to the interest of *Lodge's* heirs in this land. Besides, he could not have entered for the purpose of securing or coercing the payment of the purchase money, or of the balance of the purchase money, for the plainest possible reason: he

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had already received the full purchase money, as appears by the writing of the 7th of *December*, 1782. That paper called a receipt, and which we must suppose to be authentic, *on this question*, appears to be in substance a conveyance. It describes the land and the boundaries, specifies the consideration and the payment of it. Wanting a seal it is not technically a deed. But a seal is not believed to be essential to the transfer of lands. Writing and signature only are requisite by the act of assembly. To be sure the word "heirs" is left out; but that, I apprehend, makes no difference. No doubt a fee simple was intended, and I should say a fee simple passed. Indeed on this very paper of transfer this suit has been brought by the heirs of *Jonathan Lodge*, and no objection to their recovery has been attempted, because of the want of words of inheritance. Therefore, there appears no contingent interest which *Haines* could possibly have of his own to protect, and no conceivable inducement to enter on the land in character of trustee. It was no part of the bargain that he was to keep possession even before a cent of the purchase money was paid; far less is it to be implied, that he was to have possession after the whole of the money had been paid. He had nothing to receive, and nothing to do except to sign a deed, if ever *Lodge* or his heirs should think fit to call upon him for the purpose.

Now, it does appear to me, taking the facts from this record, and, supposing that all the evidence given in the cause is here contained, and viewing all the circumstances of that entry by *Haines*, and the subsequent possession of himself, and his devisees, that if all these matters do not, by law, amount to a disseisin, and to an actual ouster, but only to what is called a trust, a mere trust, unprotected by any length of possession, or, by the act of limitations, then there can, perhaps, be no circumstances under which that statute can, with certainty, be said to protect any possession.

We may presume, from this record, that, relative to the act of limitations, the same principles of law were contended for, by the counsel of the plaintiffs below, which they rely upon here, particularly, that the legal possession of land is to be considered in him who has the right. Add to this, the usual supposition of hardship, in taking away the fair property of a man, and giving it to another, by virtue of length of time, and an act of assembly; and the jury, from this direction of the court, on the point of law proposed, may have thought themselves bound by the act of limitations, or not bound by it, just according to their opinions of the merits of the case; and that they were at liberty to create and imagine an intent for *Haines*, which he, *Haines*, never dreamt of. They might, indeed, be almost induced to consider it their duty to do so. For why should not the jury, in this creation of their own, imagine every thing to have been fair and honest, and presume for conscience and justice, rather than for knavery and oppression; and that *Reuben Haines* took possession of the land. not intending to deprive

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the owners of their property by the act of limitations, but to hold it faithfully in trust. Thus, in condemning the title of the intruder, the jury would, in every case, support his character for honesty. If it shall be asked, what harm can come of all this? I answer, it is contrary to the words and spirit of the law. It tends to litigation and uncertainty. It goes near to evade, or rather to overrule, the statute of limitations; a statute, which, whether hard or not, must not, while it remains unrepealed, be suffered to be dispensed with by the court, or by the jury. It ought to be remembered, that in every case, without exception, where that statute is brought into effective operation, it is brought to support a title otherwise apparently bad, against a title otherwise apparently good. The hardships of the law are evident, while its most usual effect in protecting titles, originally good and valid, but the evidences of which have perished by accident and length of time, is almost entirely unseen. Jurors, therefore, will not, I apprehend, be likely to enforce the act of limitations, unless they consider themselves bound by the plain words of it. So that, what in other cases might pass as a trifling inaccuracy in a charge to a jury, cannot be overlooked, when uttered with reference to this important statute.

In every case of exception from the general words of the act of limitations, the exception must, in my opinion, be made out by proof. It is never to be presumed. If a man takes possession of the land of infant children, proof that he was a guardian of the children, will usually form a case of exception from the words of the law, and make him a trustee. So one tenant in common, or coparcener, taking possession, will be deemed to hold for his partners as well as himself. So a tenant, holding under a lease, or by permission, will not be protected against his landlord by any limitation. So a purchaser taking possession, under contract to pay the purchase money, and not paying it, will not be aided by length of time. But, in all these cases, and in every similar case, I take it, the fact of being father, guardian, partner, tenant, or purchaser, must be made to appear by evidence, or, there must be proof of acknowledgment, or declaration whereon to found the trust; otherwise, the only presumption which can exist, will be the common presumption of law, that, whatever a man does, or acquires, he does, or acquires for himself, and not for others.

As to the presumption of law, relied upon by the counsel for the defendants in error, that the possession is in him who has the right, most evidently the cases cited on that point seem wholly inapplicable here. Clearly they apply to questions of undefined boundaries, or of interfering boundaries, and to no other case.

On all the other points of the case, I concur with the Chief Justice.

DUNCAN, J., and HUSTON, J., having been of counsel in the cause, took no part.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JULY 2, 1827.]

STROHECKER, who survived GARVER, against GRANT and others, Executors of GRANT.

Where a covenant is made by one man for the benefit of another, an action must be brought in the name of the party to whom it was made, and not by him for whose benefit it was made.

A count against executors on their own covenant in a deed executed by virtue of a power in the will, and in execution of an agreement made by the testator, cannot be joined with one against them on the covenants of the testator. Such defect is not cured by a verdict.

THIS cause, which was an action of covenant brought by *John Strohecker*, who survived *John Garver*, against *George, Deborah, and William Grant*, executors of *Thomas Grant*, deceased, was tried before *ROGERS, J.*, at a circuit court for *Northumberland* county on the 18th of *April*, 1827, when the jury under the direction of the judge gave a verdict for the plaintiff. A motion was made on behalf of the defendants for a new trial, which having been overruled, an appeal was entered to the Supreme Court in Bank.

The cause had been removed by *certiorari* from the Court of Common Pleas of *Northumberland* county, where, on the 23d of *April*, 1826, Mr. *Weaver*, administrator *de bonis non* with the will annexed, was substituted in the place of the original defendants, who were discharged from their office.

The declaration contained three counts, the *first* of which set forth that *Thomas Grant* in his lifetime; viz. on the 26th of *April*, 1815, by his agreement of that date, made with *Daniel Strohecker*, who was the agent of *John Strohecker* and *John Garver*, duly authorised, and in consideration of sixty-dollars an acre for the land therein mentioned, to be paid to the said *Thomas* and his executors, did covenant and agree with the said *John Strohecker* and *John Garver* by their agent the said *Daniel Strohecker*, to sell and assure unto the said *John Strohecker* and *John Garver*, their heirs and assigns, all that certain tract of land, &c., free and clear of all incumbrances, done or suffered by the said *Thomas*; and the said *Thomas* did then and there for himself, his executors, and administrators, covenant and agree to and with the said *John Strohecker* and *John Garver*, by their agent aforesaid, that before and at the time of executing the aforesaid articles of agreement, he the said *Thomas* was the true proper, sole, and lawful owner of the said premises, and had good right and lawful authority to sell, grant, and assure the same free and clear of and from all other grants, bargains, and incumbrances whatsoever. And the said plaintiff saith, that the said *Thomas*, afterwards, to wit, on the 12th of *May*, 1815, made his last will and testament, whereby he appointed

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the aforesaid *Deborah, George, and William*, his executors, and gave them full authority to sell and convey the land of which he died seised, and to execute fully the contracts made by him in the same manner as if he were living; after whose death the executors aforesaid, by their deed dated the 15th of *June*, 1816, duly executed, acknowledged and recorded, in pursuance of the power vested in them, and in that capacity only, in compliance with the said agreement, in consideration of sixteen thousand five hundred and three dollars and thirty-two cents by the said *John Strohecker* and *John Garver* paid to the said executors, and in execution of the articles of agreement aforesaid, did grant, bargain, sell, convey, and assure unto the said *John Strohecker* and *John Garver*, their heirs and assigns, the aforesaid tract of land, &c., and by the same, the said *Deborah, George, and William*, as executors aforesaid, and in that capacity, did covenant that they, the said executors, would warrant and defend the premises to the said *John Strohecker* and *John Garver*, their heirs and assigns, against the lawful claims of all persons whatsoever; and the said *John Strohecker* and *John Garver*, there afterwards on the same day and year last aforesaid, entered into the said tract of land, and became possessed thereof, and ought to have and enjoy the same as their lawful estate in fee simple, according to the aforesaid covenants of the said *Thomas* in his lifetime, and his said executors since his death; but neither the said *Thomas* in his lifetime, nor his executors since his death, have kept their and each of their covenants aforesaid respectively, but have broken the same; for that he the said *Thomas* was not lawfully seised in fee of said tract of land, and had not good right to sell and convey the same to the said *John Strohecker* and *John Garver*, in fee simple, and that he hath not, nor have his executors warranted and defended the same to the said *John Strohecker*, who survived the said *John Garver*, although severally requested so to do; but a certain *Rebecca Stedman* being the rightful owner of ninety-five acres, part of the said tract of land sold and conveyed in fee to the said *John Strohecker* and *John Garver*, taken from, &c., of the breadth, of, &c., on the river, &c., of the value of six thousand dollars, the said *Rebecca* recovered judgment for her seisin and possession, &c., against the said *John Strohecker*, who survived the said *John Garver* and his tenants, at a Court of Common Pleas held, &c., and by force of an execution issued thereon, she the said *Rebecca*, afterwards, to wit, &c., entered into the said ninety-five acres, and became legally seised thereof, and now legally holds the same in fee, and so the said *Thomas* in his lifetime, and his said executors since his death, have not kept their covenants aforesaid, but have broken them, to the damage, &c.

The *second* count set forth, that *Thomas Grant*, in his lifetime, by articles of agreement dated the 26th of *April*, 1815, made between him and the aforesaid *John Strohecker* and *John Garver*, in consideration, &c., did grant, bargain, and sell unto the said

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John Strohecker and John Garver, in fee simple, all that certain tract, &c., and the said *Thomas*, for himself, his executors, and administrators, did covenant and agree with the said *John Strohecker* and *John Garver*, that he was legally seised in fee of the premises, free of all incumbrances done or suffered by himself, and at the time of executing the said articles, and before, was the sole and lawful owner of the said tract of land, and had good right and lawful authority to grant, convey, and assure the same free and clear of all other grants, bargains, and incumbrances whatsoever; that the said *John Strohecker* and *John Garver* paid the purchase money and entered into possession of the premises. It then averred, that the said *Thomas Grant*, at the time of executing the agreement, was not seised in fee of the said tract of land, and had not good and lawful authority to convey and assure the same, and that the premises were not free and clear of all other grants, bargains, and incumbrances whatsoever, but that the right and title to ninety-five acres, part of the said tract, was in a certain *Rebecca Stedman*, who recovered the same by due process of law, &c.

The *third* count set forth the agreement, dated the 26th of *April*, 1815, between *Thomas Grant* and *John Strohecker* and *John Garver*, the death of *Thomas Grant*, after having made a will by which he appointed the defendants his executors, with power to sell, as stated in the first count, and that the defendants, by virtue of that power, and in pursuance of the agreement, on the 14th of *June*, 1816, did, by their deed, grant, bargain, sell, alien, enfeoff, release, and confirm, unto the said *John Strohecker* and *John Garver*, their heirs and assigns, the aforesaid tract of land, &c. That the said executors, in that capacity, did covenant, promise, and grant, to and with the said *John Strohecker* and *John Garver*, that the said *Thomas Grant*, in his lifetime, and at and before the execution of the agreement, was the proper, sole, and lawful owner of the premises, and died seised thereof. That the defendants had in themselves, as executors, good right, full power, and legal authority to grant, bargain, sell, and release, and confirm the same to hold as aforesaid, and that they were free and clear, and freely and clearly exonerated, discharged and acquitted of and from all other gifts, grants, bargains, sales, and incumbrances whatever, done or suffered, either by the said *Thomas* in his lifetime, or by his executors since his death; and that the said executors, in that capacity, would warrant and defend the same against the lawful claims and demands of all persons whatsoever. The count then denied the performance of the covenants by the defendants, and the eviction of ninety-five acres, part of the premises conveyed, by the recovery thereof by *Rebecca Stedman*.

To this declaration, the defendants pleaded *non est factum, non infregerunt conventiones, non damnificatus*, award and satisfaction, covenants performed, &c.; to which they afterwards added the following plea:—

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That on the — day of —, *A. D.* —, an amicable partition was had between the said *John Strohecker* and the heirs of the said *John Garver*, deceased, whereby the heirs became seised of a moiety of the land conveyed by the executors of *Thomas Grant* to *John Strohecker* and *John Garver*, which moiety included the quantity of 95 acres, of which the plaintiff in his declaration alleges an eviction by a certain *Rebecca Stedman*; and, being so thereof seised, the heirs of the said *John Garver* sold, and by their deed, with covenants of special warranty, dated the 29th of *April*, 1820, conveyed (*inter alia*) for a valuable consideration, the said ninety-five acres to a certain *George Kremer*, who, after the eviction aforesaid, compromised with the said executors of the said *Thomas Grant*, and settled with them all claim for damages sustained by reason of the said eviction, and hath received from them full compensation therefor; and the said defendants for further plea allege, that, in consequence of the partition so as aforesaid, between the said *John Strohecker* and the heirs of the said *John Garver*, no right of action on the covenant of general warranty in the conveyance of the executors of the said *Thomas Grant* to the said *John Strohecker* and *John Garver* could accrue to the said *John Strohecker*; for that he still retains possession of, and remains in the full and undisturbed enjoyment of the portion of land allotted to him in the amicable partition, so as aforesaid made, and the defendants further say, that the estate of the said *Thomas Grant*, deceased, is not liable to any damages, on any of the covenants in the said declaration of the said plaintiff mentioned.

And for further plea, the defendants say that the said *John Strohecker* and *John Garver* were not parties to the said agreement with the said *Thomas Grant*, nor was either of them, nor were they or either of them bound thereby; but that the same was made by the said *Thomas Grant* with *Daniel Strohecker*, the said *Daniel* acting therein in his own right and behalf, and without any authority from the said *John Strohecker* and *John Garver*, or either of them, as either of their agent or attorney in the said agreement, &c.

Upon the evidence given under these pleadings, which, as the opinion of the court turned upon the sufficiency of the declaration need not be stated, His Honour instructed the jury that the plaintiff was entitled to recover, and that the measure of damages was the purchase money paid for the land, with interest from the time of eviction.

Hepburn and Marr, for the appellants.

Frick and Greenough, *contra*, cited *Collins v. Weiser*, 12 *Serg. & Rawle*, 97, and 5 *Johns*. 59.

The opinion of the court was delivered by

DUNCAN, J.—This is an appeal from the decree of Judge ROGERS, who decided in favour of the plaintiff generally; merely for

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the purpose of having the whole case brought before this court and disposed of.

The topics here discussed have been principally on the form of the declaration, which the defendants contend is so substantially vitious that no verdict could cure it, and on the misjoinder; uniting in the same action demands in different rights.

It is the duty of judges to preserve the forms of actions, and parties are not to be permitted to convert them by their own contrivances. Innovations of this kind should be resisted. The doctrine of pleading is founded in strong sense. Its excellence consists in its simplicity, in bringing some precise fact to issue; though certainly it has been often misapplied. A man shall not be permitted to spread his net so that with one sweep he may catch every thing: this would mislead his opponent, perplex the court and jury with multifarious and inconsistent claims, and render it necessary to render different judgments in the same action.

The objections to the declaration here, are, that they jumble together articles made with the testator, containing his own covenants and different covenants with the executors, on their personal agreement with different persons; on which no good verdict can be rendered, and on which it would be necessary to render several judgments very distinct in their nature, and issue execution in different rights, and which, in the distribution of assets, would make a contract of the executors to come in as a specialty debt.

This declaration is open to all these objections, and is incurable. The first count is on a covenant entered into between *Daniel Strohecker*, as the agent of *John Strohecker* and *Daniel Garver*, lawfully authorized to make these covenants with the testator, and they allege an execution of the contract by the conveyance made by his executors to *John Strohecker* and *John Garver*, and that they, as executors, entered into a covenant of general warranty; and they allege a breach in the covenant of seisin in *Thomas Grant's* life, and a breach of their own covenants of warranty, as executors. Now, this is all misconceived; for where a covenant is made by one man for the benefit of another, the action must be brought in his name who made the covenant, and not the person benefited thereby. Not so in assumpsit; for there the person for whose benefit the promise is made may support the action. On the covenant of seisin by *Thomas Grant*, and the eviction under a title from himself, the whole money paid is recoverable. The injury is not a nominal but a permanent one, and affords one cause of action: it would have been different if there had been no eviction, for there the damages would be nominal, and the real damages sustained afterwards might be recovered. The covenant was broken, once for all, and all possible damages sustained. There could be no joinder of action, because, in the covenant of general warranty which the executors entered into, they individually, jointly and severally bound themselves, and this would absorb the

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implied covenant in the words grant, bargain, and sell. On this count, then the judgment, if the count be good, must be several, against them in their own right, and the execution of their own proper goods; and against them, as executors *de bonis testatoris*, on the second count; and, if this judgment was recovered against them on the covenants in their deed, and could be *de bonis testatoris*, that it would be of the assets, as a specialty debt, or a specialty of the executors, and not of the testator.

The second count, which is principally relied on by the plaintiff, is on the covenant in the articles of agreement with *Thomas Grant*. This states an agreement between *John Strohecker* and *John Garver* and *Thomas Grant*. Whereas the articles, of which profert was made, was one between *Thomas Grant* and *Daniel Strohecker*; besides, it could not be joined with an action in which *Daniel* could alone be the legal party.

The third count is on the conveyance made by the defendants to the plaintiff, and purports to be on the general warranty, in their character of executors. Whereas the covenant is, "that they, the said *George, Deborah, and William*, and their heirs, the aforesaid tract of land, shall and will warrant, and for ever defend, against all persons." It is not, that the estate of *Thomas Grant*, shall warrant and defend, or that they, as executors, shall warrant and defend, but that they and their heirs shall do so.

The action against the defendants on their own covenants, cannot be joined with one against them in the covenants of the testator; the plea and judgment could not be the same, and that always designates where actions may be joined. *Gilb. H. C. P. 7. 2 Wils. 321.* But a plaintiff can no more join an action in his own right with one as executor, than he can against a man in his own right, and as executor. *Cook, 235. L. R. 891. 2 Stra. 1271.*

The case from *Strange and Raymond* certainly proves, that a count for money had and received to the executor's use, as such, may be joined to one for money had and received to the use of the testator, or, at least, that a verdict will cure it; and that a count on a promise by the executor, as such, may be joined with a promise made by the testator; but declarations on bare assumpsits, are widely different. A defendant who promises out of the assets, promises as executor. The judgment against him would be *de bonis testatoris*, but not so of bonds; for a bond given to the executor, cannot be joined in an action on a bond given to the testator; and, in tracing up this joinder of actions, this doctrine will be found to prevail. This declaration is bad; no verdict can cure it; no judgment can be rendered on any one count, for the evidence given could not support any one count. And then this joinder of persons, and of different things, cannot be cured by verdict. Here the action was not tried against *George, Deborah, and William Grant*, but *Martin Weaver*, administrator, with the will annexed. The court will refrain from giving any opinion, as to the nature of

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the action, that might be supported against the defendants, or whether any could, and what would in any court be the extent of damages recoverable. It is here a matter worthy of consideration, whether, as these covenants for title, all of which run with the land and pass to the assignees by the common law, who may have an action against the vendor and his representatives. 1 *Rolls. Ab.* 521. *Corke Charees*, 503, 5. *Sir W. Jones*, 406. *Sudg. Vend.*, and as the covenants relate to the land, and were unbroken in the lifetime of *George Kremer*, and so long as the seller had not a good title there is a continuing breach, and it is not like a covenant to do an act of solitary performance, which not being done, the covenant is broken once for all, an action could be supported in the name of the present plaintiff, who has no title to the land, or by any one; as the assignee has received satisfaction for the covenants broken. These, however, are mere suggestions, not matters decided, or on which the court have given any opinion; but, for the reasons stated above, the judgment is reversed.

Judgment reversed.

[SUNBURY, JULY 2, 1827.]

'The COMMONWEALTH, for the use of ROGERS, against BENNETT'.

IN ERROR.

An appeal lies from the judgment of a justice of the peace, in an action for the penalty incurred by neglecting to serve notice under the arbitration act of the 20th of *March*, 1810.

Such an action may be referred, under the said act of the 20th of *March*, 1810.

WRIT of error to the Court of Common Pleas of *Lycoming* county.

This suit was originally brought in the name of the Commonwealth, for the use of *Seth Rogers*, against *John Bennett*, before a justice of the peace, to recover the penalty of twenty dollars, imposed by the eighth section of the arbitration act of the 20th of *March*, 1810, for neglecting to serve notice of the time and place of the meeting of arbitrators on *Solomon Barless*, an arbitrator in the case of *John Bennett v. Seth Rogers*, pending in the Court of Common Pleas of *Lycoming* county; in which case a rule of reference had been entered by *Bennett*. The justice gave judgment for the penalty against the defendant, who appealed to the Court of Common Pleas. A rule was afterwards granted by that court, to show cause why the appeal should not be stricken off, and

(The Commonwealth, for the use of Rogers, v. Bennett.)

the proceedings stand in the meantime. The court discharged the rule, and sustained the appeal.

The defendant afterwards entered a rule of reference under the act of the 20th of *March*, 1810, and the arbitrators gave an award for the defendant, upon which judgment was entered.

The record was removed, by writ of error, to this court, where *Armstrong*, for the plaintiff in error, contended,

1. That the court below erred, in refusing to strike off the appeal, none being allowed by the eighth section of the act of the 20th of *March*, 1810, regulating arbitrations. He cited, 4 *Serg. & Rawle*, 190. 2 *Serg. & Rawle*, 463.

2. That the action being for a penalty, the arbitrators had no jurisdiction of the case. To this point he cited, *United States v. Buckwalter*, 11 *Serg. & Rawle*, 197. 13 *Serg. & Rawle*, 44. *Id.* 102.

Beecher, contra, referred to 5 *Binn.* 463.

The opinion of the court was delivered by

GIBSON, C. J.—The right of trial by jury is supposed to be guarded by the constitution, and we are, therefore, to construe acts of assembly, which admit of construction, and would otherwise impair it, so as not to infringe on the constitution. The penalty in question, is made recoverable as debts of less amount than five dollars and thirty-three cents are recoverable, in respect to which the judgment is without appeal. But there are other consequences peculiar to an action for a debt of this class; such, for instance, as the judgment being without stay of execution, and these we must suppose to have been exclusively in the contemplation of the legislature, to whom we ought not gratuitously to impute an intention to destroy a right secured by the constitution.

The remaining point is attended with still less difficulty. A prosecution for a criminal matter, whether by indictment, information, or action for the forfeiture, is not within the purview of the compulsory arbitration act, all the provisions of which are adapted exclusively to the proceedings in civil suits. But an omission to give notice of the time and place of the meeting of the arbitrators, is without the least smack of criminality whatever. The penalty is imposed not to punish, but to compensate; and, although the justice has ignorantly entitled the suit in the name of the commonwealth, for the use of the party aggrieved, yet that cannot alter the nature of what the legislature had in view—satisfaction for a private injury, without the smallest cast of an offence against the public.

Judgment affirmed.

[SUNBURY, JULY 3, 1827.]

BAGLEY and another *against* WALLACE.

IN ERROR.

Lands vested in the commonwealth, under the act of attainder of 1779, could be sold only in the mode prescribed by that act, and its supplement. The limitation of suits for land, does not run against the Commonwealth. Ejectment lies by a mortgagee: but, on his recovery, it is error to limit the right of redemption to one year. A verdict in ejectment for the mortgagee; "he to extinguish all claims of the *Miles* family," is uncertain and erroneous.

THIS was an ejectment, brought by *Wallace* in the Court of Common Pleas of *Susquehannah* county, against *Tiffany*, and *Bagley* his tenant, for one hundred and forty-two acres and eighty-two perches of land. *Wallace* had sold and conveyed the land. For a balance of the purchase money, *Tiffany* had given a mortgage, dated the 10th of *August*, 1821, and upon that mortgage this ejectment was brought. The defence was, a defect of title. The title asserted by *Wallace*, was held under warrants in the names of *Barnabas Binney* and *John Dunlap*; being two of sixty warrants for four hundred acres each, all dated the 22d of *February*, 1785, and which, as appeared by a land office receipt for two thousand four hundred pounds, the purchase money, dated the 3d of *August*, 1785, were all taken out, and paid for by *John Nicholson*. The leading warrant was in *Nicholson's* own name, calling for land, "on the northerly waters of *Tunkhannock* creek, lying at the second branch of the main or northerly branch of said creek, to include said second branch, and a large hop bottom. Surveys were made on those warrants, and the warrants of *Binney* and *Dunlap* were laid on the land in question the 19th of *September*, 1785, by *William Gray*, deputy surveyor. The title of *John Nicholson* to the sixty tracts, was regularly brought down to *Wallace*, the plaintiff.

The opposing title, appeared to be a warrant dated the 20th of *August*, 1774, to *Benjamin Chew* for three thousand acres; and a survey upon it, made the 24th, 25th, and 26th of *September*, 1775, of two thousand seven hundred and eighty-six acres, in nine adjoining tracts, by *Charles Stewart*, deputy surveyor. This survey of two thousand seven hundred and eighty-six acres, included a principal part of the land in question.

A deed, dated the 16th of *October*, 1775, by *Benjamin Chew*, *Andrew Allen*, *Samuel Meredith*, *Edward Shippen*, jr., and *Joseph Shippen*, jr., declaring the warrant aforesaid, in the name of *Benjamin Chew*, to be held by them in common, together with other lands, amounting to thirty-six thousand acres: *Robert Wilson* to have one fourth part for locality.

(Bagley and another v. Wallace.)

The proceedings of the supreme executive council, of the 1st of *September*, and 9th of *October*, 1789, making partition of the said thirty-six thousand acres, with the other proprietors, in which five thousand eight hundred and seventy-three acres, were assigned to the commonwealth as her share, accruing by the attainder of *Andrew Allen* for treason; and, including in the share of the commonwealth, the said survey on the warrant to *Benjamin Chew*.

It was also in evidence, that in 1788, one *Hutchinson* made a written contract with *John Nicholson* for the land in question in this ejectment, now called the *Miles's farm*, entered into possession the same year, resided five or six years, sold to *Robinson*, who sold to *Page*; and, that *Page* went into possession about twenty-five years ago, and sold his interest to one *Teuxbury*, for two hundred and fifty dollars; that *Teuxbury* built a saw mill, planted an orchard, and sold out his interest and possession to *John B. Wallace*, the plaintiff in ejectment, for seven hundred and twenty dollars: That *Joseph Miles* then entered under *Wallace*, built a large house and barn, made other improvements, and resided until his death; that, in *October*, 1816, his administrators, by order of the Orphans' Court, sold all the interest of *Miles* in the farm to *John W. Robinson*, for two thousand and five dollars: *Robinson* exchanged it for other land with *Tiffany*, the defendant, and *Tiffany* gave the mortgage in question for the balance of the purchase money due and owing to *Wallace*, the plaintiff.

The record proceeded as follows: "And thereupon the defendants' counsel prayed the court to charge the jury, that the act of 1779, directing the mode of selling the forfeited estates, conferred no authority on the officers of the land office, to sell those lands by warrant in the usual form, and that *Nicholson* obtained no title to the forfeited lands, held by the state in right of *Andrew Allen*, by his warrants of the 22d of *February* and subsequent surveys.

And the said judges, thereupon refused so to charge the jury, and charged them as follows, to wit:

The court are of opinion that the act of 1779, directing the mode of selling the forfeited estates, was intended to give authority to the officers of the land office they did not possess before, but was not to affect their general authority to sell wild lands, by warrant and survey; and that, when wild lands were vested in the commonwealth by forfeiture, they might dispose of them as any other of her wild lands; and, that the defendant would be safe in the payment of the money due on the mortgage; that the commonwealth after having sold the land, and received her full pay, and the land had been settled for more than forty years, and valuable improvements made and acquiesced in by the commonwealth; she would not, and that a purchaser under her, who must have full knowledge of the defendants rights, could not disturb them.

That it is the rule, that the plaintiff must recover on his title as it was at the commencement of the suit. But, in an equitable pro-

(Bagley and another v. Wallace.)

ceeding like this, if it appears at the trial that the plaintiff has a good title, no injury will be done the defendant, by finding a verdict for the plaintiff for the lands in question, subject to be set aside on the defendants paying the amount of principal and interest due, within such reasonable time, as shall be fixed by the jury; if you think proper, on the plaintiffs paying the costs of suit.

And, with that direction, left the same to the jury, and the said jury then and there gave their verdict as follows, to wit:

That they find for the plaintiffs the lands: the plaintiffs shall pay the costs. The defendant, by paying up the mortgage and interest in one year, shall be entitled to the lands. The plaintiff to extinguish all claims of the *Miles* family.

The opinion of the court was excepted to by *Tiffany's* counsel, and

Eight errors were now assigned.

1. The court erred in charging the jury, that the act of 1779, directing the mode of selling the forfeited estates, was intended to give authority to the officers of the land office, to sell and dispose of lands vested in the commonwealth by forfeiture.

2. The court erred in charging the jury, that when wild lands were vested in the commonwealth by forfeiture, the officers of the land office might dispose of them, as of any other of her wild lands.

3. Similar to the second.

4. The court erred in charging the jury, that the defendant would be safe in the payment of the money due on the mortgage.

5. The court also erred in charging the jury, that the commonwealth, after having sold the land, and received her full pay, and the land had been settled for near forty years, and valuable improvements made and acquiesced in by the commonwealth, would not, and that a purchaser under her, who must have full knowledge of the defendant's rights, could not disturb them.

6. And the court also erred in charging the jury, that if it appeared at the trial that the plaintiff had good title, no injury would be done the defendant by finding a verdict for the plaintiff for the land in question, subject to be set aside on the defendant's paying the amount of principal and interest due within such reasonable time as shall be fixed by the jury.

7. There is also error in the verdict of the jury, in this—that they have limited the time within which the defendant may redeem the lands by payment of the mortgage money and interest to one year.

8. The verdict is uncertain.

Case, the counsel for the plaintiff in error, argued the five first exceptions relating to the title. The question is of the utmost importance, involving many valuable tracts of land in our country. By the attainder of *Andrew Allen*, the right is yet in the commonwealth, undivested and uninjured by time. The grant to *Nick-*

(Bagley and another v. Wallace.)

Olson was a nullity. It was not vacant land. It had been appropriated by a warrant and survey. Not only was the mode and form of the alleged grant directly against the law, and the price of it inferior and unwarranted, but it was made by officers without even the colour of authority. The attainting act and its supplement, (1 Sm. L. 449, 467,) directs all and every the forfeited lands to be sold by the supreme executive council, not at ten pounds per one hundred acres, the price for which warrants for vacant land were issued, but at public auction to the highest bidder: and the conveyance to be by deed under the hand of the president or vice president in council. It will hardly be argued that the clear rights of the commonwealth can be divested by the act of limitations. As to hardship, liberality, &c., if those words can be applied in this case at all, they must be used in the legislature, and not *here*, against the commonwealth, in defiance of positive law.

The 6th and 7th errors, would be of themselves conclusive. The jury had no power to decree a foreclosure. The plaintiff, when he might have sued by *scire facias*, elected his remedy by ejectment; and must be bound by his own election. A mortgagee in possession, is in but as tenant by *elegit*, accountable for the profits. The mortgagor may redeem any time within twenty years. This right of redemption is expressly recognized by the act of 1705, which gives the *scire facias*. (1 Sm. L. 59. *Burnet v. Denison*, 5 Johns. Ch. 35. Even if the jury had the power to foreclose, the shortness of the time allowed here, one year only, is unreasonable, and without any example.

8th exception. The verdict is upon a condition: and that a most uncertain one. *The plaintiff to extinguish all claims of the Miles family.* What *Miles* family is not said, nor which of them; nor what claims. The meaning of the jury can never be understood from the record: and the defendant can never be certain of securing to himself the benefit intended him by this part of the verdict. "*All claims*" is more uncertain than "*all liens*:" yet in *Spalding v. Irish*, 4 Serg. & Rawle, 322, the award required "*all liens to be deducted*," and the objection was held fatal. In ejectment, a verdict for so much of the message as stands on a certain bank, bad for uncertainty. 7 Bac. Ab. 35. *Verdict 2. Deihl v. Evans*, 1 Serg. & Rawle, 367.

Conyngham and Mallery, for the defendant in error.

The warrant of *B. Chew*, not calling for the land in dispute, was greater in 1774—surveyed in 1775—not returned, or at any rate not returned for patenting, until *October*, 1775, after both our warrant and survey. In 1876, *John Nicholson*, was comptroller-general. His exertions during that year and afterwards, are a part of the history of the country; they were fully proved on the trial, and were made for the benefit of the commonwealth more than his own, and in opposition to the *Connecticut* title, by which this part of the state was then likely to be overrun. He made a

(Bagley and another v. Wallace.)

road for *Pennsylvania* settlers to reach that country, known at this day by the name of *Nicholson's* road. He brought on forty families, furnishing them with provisions, and all the means of settling a new country. He put *Hutchinson* on the tract in question, and from that time a continued occupancy has been had for thirty-nine years under *Nicholson*, and under a title granted by the authorized officers of the commonwealth, and duly paid for. If at first the interference with the survey on the warrant of *Chew* was unintentional, yet there can be no doubt but the subsequent partition and assignment to the commonwealth of the survey in the name of *Chew*, as part of her share, was designed by the officers of government for the express purpose of quieting the title of *Nicholson*, and thus inducing him to persevere in his efforts to settle the country and protect the public lands from intrusion. All these acts were done knowingly, by the public officers, in the course of their duty, for the benefit of the commonwealth, and therefore, we submit, the commonwealth is bound by them, and our title valid.

Besides, *non constat*, that the condition of *Chew's* warrant was complied with. There is no proof of the payment of the purchase money, and payment ought not to be presumed in order to defeat an old title and a possession of forty years without notice, or the possibility of notice. A vacating warrant was not necessary. The land officers might proceed on the forfeiture; and after long acquiescence by one party, and long possession by the other, the reasons ought not to be required to be given. *Lowrey v. Gibson*, 2 *Yeates*, 81. *Young v. Beatty*, 1 *Serg. & Rawle*, 74. *Andrew Allen's* right in the land was at any rate but a mere equity, and for that reason also, it was not necessary to be sold at public auction.

The act of limitations will protect under the facts of this case. That act protects against the commonwealth claiming under an individual. If the statute had commenced running against *Allen*, it must run on. We admit the statute is no protection to those claiming under the commonwealth by improvement right. We admit it is no bar, in any case, where the sovereign is in by original right of dominion; but, it never has been decided that the statute runs not against the commonwealth, as to all secondary and derivative titles.

The defendant received possession from *Wallace*, and gave his mortgage. Let him, therefore, pay the money, or give back the possession. He alleges an outstanding title. That title, if it ever existed, has been abandoned for more than forty years. Neither defendant, nor those on the land before him, have been molested by it. Never, indeed, does it appear to have been mentioned, until now, by *Tiffany* himself, against his own right, and, as a defence to this action. Therefore, we submit, the court below were right in telling the jury, the defendant would be safe in honestly complying with his contract: and, that the commonwealth could not, and

(Bagley and another v. Wallace.)

would not if she could, come in upon little objections of form, and sweep away the improvements and earnings of two generations of men, holding by warrant and survey, and full payment of the purchase money; while she, the commonwealth herself, by all her officers, has not only been silent as to any objection, but has been active in making up the title now asked to be set aside.

The sixth and seventh exceptions appear to arise altogether from a misconception of the meaning of the verdict. The right of redemption is not restricted to one year. The substance is a stay of execution for one year: not meddling with the redemption, but leaving it to the law.

The eighth exception, to the wording of the verdict, seems but a small matter. The Orphans' Court records, and the liens of the *Miles* family, had been read in evidence; the jurors referred to them as matters notorious. The substance of the verdict ought to have been taken without regard to the form; and, probably, it would have been so, had there been any doubt of the meaning of the jury at the time. But, retaining the words as they are, there is nothing ambiguous. The record shows, conclusively, what are meant by the claims of the *Miles* family. *Steigleman's Administrators v. Wolfersberger*. 5 Serg. & Rawle, 167. *Hart v. Porter's Executors*. *Ibid*: 201.

The opinion of the court was delivered by

TOD, J.—This judgment appears to be erroneous. By the attainder of *Andrew Allen*, his lands, whether held by legal or equitable rights, were by the law vested in the commonwealth, to be sold by officers, specially appointed, and in a special mode, *by auction, to the highest bidder*; and the officers appointed to that duty were to be bound by oath, not to be interested directly or indirectly, or to make any benefit by the forfeited estates. The officers of the land office were bound by this law, and could not appropriate the forfeited estates, or any part of them, by warrant and survey: nor could they confirm such appropriation by any act, or by any acquiescence. Warrant and survey were for vacant lands only. The title of *John Nicholson* was null and void, so far as it interfered with the estate forfeited by *Allen*.

Then does the act of limitations help the case? We think not. The general rule is admitted, that the commonwealth is not bound by the statute; but it is said there is a distinction, that though the commonwealth is not bound in her sovereign right of original dominion, yet, as to every secondary or derivative right of property, she is bound by the act. This distinction cannot be admitted. It seems to be unknown to the law, and it would abolish the implied exception altogether, as far as it respects *Pennsylvania*; for it is supposed, the only title which the commonwealth can have in lands must be secondary or derivative.

(Bagley and another v. Wallace.)

Admitting the title of the commonwealth, it is argued by the counsel of the defendant in error, that there exists no real cause to apprehend disturbance, by or under the commonwealth, to *Tiffany's* possession. They say, that such a thing never was heard of in *Pennsylvania*, and never will be, as an attempt by the government, to take from honest purchasers their property and their homes, after a quiet possession of two score years, on land twice purchased and paid for: first, from the old proprietaries, and then from the commonwealth, informally, indeed, but with the full knowledge of all the officers of government. All this I believe to be true. Indeed, I could almost say, I am sure it is all true, provided the facts are as stated. Yet, what we are to decide, is the question of title: and, we are bound to say, that *John Nicholson*, though a public officer, had no more right than any other person, to take up public lands against the express directions of the law. If any difference, his being comptroller general, makes his title the worse. If innocent persons suffer, we can only regret that such is the law. It is not for the court to be generous, and to deal out by anticipation, the liberality of the government. Several thousand acres are said to be held in the same manner with the tract in question. Then, probably, it is a subject important enough to attract the notice of the legislature.

I think, too, that the plaintiff in error has sustained both his exceptions to the verdict. Taking the verdict in connexion with the charge of the court, it seems clear to me, that the jury intended to limit the right of redemption to one year. They had no power to impose such limitation. The act of 1705, (*Sm. L.* 59,) expressly recognizes the equity of redemption, in cases of recovery by ejectment on mortgage.

The extinction of all the claims of the *Miles* family, is a vague finding by a jury, and for that reason seems faulty. What would have been easier than to say what was meant? Such sort of description would hardly do in the previous stages of a cause. If it could be permitted in a verdict and judgment, the end of one dispute might be only the commencing of another.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JULY, 7, 1827.]

The COMMONWEALTH, for the use of BELLAS, *against*
HAAS and others.

IN ERROR.

If under a judgment against the sheriff and his sureties, a levy be made upon the goods of the sheriff which are released by the agreement of the plaintiff, the sureties are discharged to the amount the goods would have sold for at sheriff's sale, after deducting the expenses of the sale.

WRIT of error to *Northumberland* county.

The opinion of the court was delivered by

ROGERS, J.—The principal facts of this cause have been fully stated in 8 *Serg. & Rawle*, 452, *The Commonwealth, for the use of Bellas, v. Vanderslice and another, Administrators of Miller*. The point there decided, has been again pressed upon the court without effect, as we see no reason to change our opinion. The circumstances relied on would not alter the principle, as, in my view of the case, it is a matter of no consequence whether, after judgment the defendants are considered in relation to the creditor, as principal or sureties. If the creditor has the means of satisfaction in his hands by legal process, and chooses not to retain it, but suffers it to pass into the hands of the person whose property it was, and he afterwards becomes insolvent, a joint principal cannot be called on. It is a discharge of the other principal *pro tanto* at least, if it does not exceed the moiety of the debt.

I am free to confess, that in my opinion the distinction between principal and surety, except as between themselves, does cease on the rendition of the judgment. I have come to this conclusion from the reason of the thing, and the authorities here cited. 2 *Serg. & Rawle*, 20. *Morrison v. Pearson*, 5 *Johns. Ch. R.* 305. 3 *Wheat.* 530.

As this came in collaterally, it is to be considered as the expression of my own individual opinion. It will be open for discussion when the point directly arises.

Until the 13th of *January*, 1811, the time of the arrangement with *Lebo*, there was no laches on the part of Mr. *Bellas*, which would discharge the other debtors. He had made every exertion to levy the money, and until that period, they could not claim an exoneration from the judgment obtained against them. It is the clear value of the property, then, for which they are entitled to an allowance. The Court of Common Pleas decided, that the property should be estimated at the price it would have sold for, in a reasonable time, after the levy, to procure a sale. In this there is

(The Commonwealth, for the use of Bellas, v. Haas and others.)

manifest error, for Mr. *Bellas* having obtained a judgment they were fixed for the debt, and never were discharged, until by virtue of the arrangement of the 13th of *July*, 1818. The plaintiff is not liable for more than the property would then have sold for at sheriff's sale, after deducting the expenses of the sale. The neat proceeds would be the measure of damages, the sum for which the defendants would be entitled to a deduction.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JULY 7, 1827.]

GRANT and others, for the use of LYON, *against* WALLACE.

IN ERROR.

Plaintiff sued in the Common Pleas for a debt exceeding one hundred dollars, without filing a previous affidavit that he truly believed the sum due exceeded one hundred dollars. The verdict for the plaintiff was reduced below that sum, by the set-off of the defendant. *Held*, that the plaintiff was entitled to his costs.

WRIT of error to the Court of Common Pleas of *Mifflin* county.

The plaintiffs sued in the court below for a debt exceeding one hundred dollars, without filing the previous affidavit that they truly believed the sum due to exceed one hundred dollars. On the trial the verdict for the plaintiffs was reduced within that sum by the set-off of the defendant under the 26th section of the act of assembly of the 20th of *March*, 1810, (5 *Sm. L.* 165,) which provides the a party suing in court and recovering a sum within a justice's jurisdiction, without such previous affidavit, shall be allowed no costs of suit. The court below entered judgment for the plaintiffs without costs; which was the error alleged in this case.

After argument by *Banks*, for the plaintiffs in error, who relied on the following authorities: *Spear v. Jamieson*, 2 *Serg. & Rawle*, 530; *Sadler v. Stobaugh*, 3 *Serg. & Rawle*, 388; *Brailey v. Miller*, 2 *Dall.* 74; *Cooper v. Coates*, 1 *Dall.* 308; *Primer v. Kuhn*, 1 *Dall.* 225, 453.

And by *Hale*, for the defendant in error, who cited 13 *Serg. & Rawle*, 288.

The opinion of the court was delivered by

TOD, J.—The question is, are the plaintiffs entitled to costs? It is remarkable that this provision in the 26th section of the one hundred dollar law, relative to costs, has continued to be the statute law of *Pennsylvania* in the identical words in which it now

(Grant and others, for the use of Lyon, v. Wallace.)

appears, excepting the sum, for more than eighty years, being first inserted in the act of assembly, passed in 1745, giving jurisdiction to justices of the peace in cases of debt to the amount of five pounds. The construction put upon it, as appears to be conceded, hitherto, invariably has been, that a plaintiff, though filing no affidavit, was not to lose his costs of suit in consequence of a reduction of his claim to a sum within a justice's jurisdiction, by the set-off of the defendant. It is contended that this construction of the law ought now to cease, because the reason of it has ceased; for by the 7th section of the same act of the 20th of *March*, 1810, (5 *Sm. L.* 165,) it is provided that any defendant neglecting or refusing to set-off before the justice a demand which he may have against the plaintiff, not exceeding one hundred dollars, shall be for ever barred from recovering it by any subsequent suit. My opinion is, that the plaintiffs are entitled to costs. I rely upon the decision of this court in the case of *Sadler v. Stobaugh*, (3 *Serg. & Rawle*, 388,) in which, as in this case, the 7th section of the one hundred dollar act was solely relied on, as changing the old construction of the law. The plaintiff in that case, sued in court without a previous affidavit: his demand was reduced to less than one hundred dollars by a set-off; and he was allowed his costs. Upon principle only, without any authority, the reasons would be strong for coming to the same conclusion in this case. It cannot, I think, well be believed, when the legislature in 1810, re-enacted the provisions of the law of 1745, relative to costs, that they did not thereby intend to adopt the ancient, uniform, and notorious construction which had been put upon the same words by the courts of law. If they intended a repeal they would probably have said it, and not have left a question of every day's occurrence to remote and doubtful implication. Besides, by the express terms of the act, the necessity on a defendant of producing his set-off before the justices, is contingent only: if he offers or alleges a claim exceeding one hundred dollars, the justice dismisses the whole matter of set-off at once without any further inquiry. Nor is there, in my apprehension, any practical inconvenience to induce us to change the old rule if we had the power. Where suits are commenced in court, and sums under one hundred dollars recovered, if the plaintiff has neglected to file the previous affidavit, it has been generally, perhaps because he was wholly unconscious of the probability of any such reduction of his demand. Bills, bonds, notes, or other matters of set-off may be in a defendant's hands without the plaintiff's knowledge. Negotiable paper may be transferred to or from a party for the very purpose of meeting a question of costs. In fact, a case may happen, in which a man cannot take a positive oath that he truly believes more than one hundred dollars to be due to him, nor yet can sue before a justice without the risk of abandoning part of his claim, nor in court without the risk of paying costs; unless we adhere to the former decisions, and say that by the spirit and in-

(Grant and others, for the use of Lyon, v. Wallace.)

tent of the law, his right to costs is not affected by the operation of a mere set-off.

Judge DUNCAN, who, from sickness, is not in court to day, has authorized me to say that he concurs in this opinion.

ROGERS, J., concurred.

GIBSON, C. J.—Previous to the act of the 20th of *March*, 1810, a plaintiff who brought his action in the Court of Common Pleas, but whose *demand* was reduced to the limits of a justice's jurisdiction by set-off, nevertheless had judgment for costs, as he could not have sued before a justice without giving up a part of his demand, sufficient to give the latter jurisdiction; and for this he would not have been entitled to an allowance in an action by the defendant: so that his loss would just have been what his demand exceeded the magistrate's jurisdiction. On the other hand, if he brought his action in the Court of Common Pleas, he could not secure himself against the loss of costs, by making the affidavit required by law, that he believed he was entitled to recover a sum above a magistrate's jurisdiction: for that would depend on a contingency not within his control; the exercise of the right of defalcation. He was, therefore, on the horns of a dilemma. If he sued before a justice, the defendant, by refusing his cross demand, might oust the justice of jurisdiction, and, if he brought his action in the Court of Common Pleas, the defendant might reduce his demand below an amount for which, without making oath of a fact to which he could not conscientiously swear, he was not by the letter of the law entitled to costs. In such a case, therefore, there would have been an absolute failure of justice, had not the court dispensed with the affidavit; and this is expressly given as the reason of the decision in *Cooper v. Coales*, (1 *Dall.* 308,) *Brailey v. Miller*, (2 *Dall.* 74,) and *Spear v. Jamieson*, (2 *Serg. & Rawle*, 530.) Thus stood the law under the former acts of assembly. But when the legislature came to pass the act of 1810, having these decisions before their eyes, and being determined to get rid of every pretext for eluding its provisions, they demolished one horn of the dilemma at a blow, by making it the duty of the defendant to set off his cross demand before the justice, on pain of being barred in any future suit. That this was actually the intention, is put beyond doubt, by comparing the antecedent decisions with the provisions of the act, and the temper of the times. Has enough then been done to remove the difficulty that existed before? There cannot be a doubt but that there has. If the plaintiff knows that there is a cross demand for a sum certain, let him give credit for so much, and bring suit for the residue; and thus do for the defendant all that the defendant could do for himself. If the cross demand be unliquidated, let him give credit for enough to give the justice jurisdiction, leaving the defendant to reduce it still lower, if he can, at the hearing. If, however, he shall believe the

(Grant and others, for the use of Lyon, v. Wallace.)

defendant not to be entitled to an allowance sufficient to reduce the demand to the limit of a justice's jurisdiction, he is then precisely in a condition to make the affidavit required by law, the effect of which is to entitle him to costs, no matter how small a sum he may recover. Thus he may proceed with perfect safety under any circumstances. Why then should he be excused for having sued in the Court of Common Pleas, if he thought his demand cognizable by a justice, or without an affidavit of the contrary, if he thought it was not? That he is bound to elect the proper tribunal at his peril where due precaution will enable him to proceed with safety, was recognized by this court in *Sadler v. Stobaugh*, (3 *Serg. & Rawle*, 388) and held in *Patton v. Newel*, at *Sunbury* in 1822, (not reported) in which the very point was decided. I know of no argument that can be set against this doctrine, but that there may be a set-off by assignment from a third person, of which the plaintiff was ignorant when he brought suit; and it is supposed that it would be hard to punish him for his ignorance. But, in such a case, why not make oath of his belief, as to the amount actually due; and thus secure himself against the consequences of one of the very contingencies for which the legislature has enabled him to provide? Where he has neglected the requirements of the law in a matter completely within his power, he comes with a bad grace for a remission of the penalty. But, were it otherwise, all that could be asked would be to consider a set-off acquired by assignment, as a special case depending, as in *Sadler v. Stobaugh*, on its own circumstances: not that it should be deemed a sufficient cause for overturning every thing before established in respect of a different class of cases. It may be proper to remark that *Spear v. Jamieson*, which has been cited as an authority on the other side, depended on the acts of assembly formerly in force, the action having been brought a year before the passing of the act of 1810. For these reasons, I am of opinion that the judgment ought to be affirmed.

Judgment reversed, so far as regards the costs, and affirmed for the residue.

[SUNBURY, JULY, 1827.]

GRAHAM, surviving Administrator of WILLIAMS, *against*
WILLIAMS.

APPEAL.

A practice by a storekeeper to balance his books at the end of each year, and charge interest on the balance of a running account, upon which there has been no settlement, is illegal.

APPEAL from the final decree of the Orphans' Court of *Mifflin* county.

The opinion of the court was delivered by

ROGERS, J.—Three exceptions, have been filed to the decree of the Orphans' Court: 1st. In not allowing interest on the account of *John Patterson*, as charged by him; in rejecting the interest on his account; and, in not allowing interest, until three months after the last item on the debit side.

The intestate, *John Williams*, opened a running account with *John Patterson*, a storekeeper in *Mifflin* county. There was no final settlement, in the lifetime of the intestate, but *Williams* paid *Patterson*, from time to time, several sums of money. *Patterson* balanced his books at the end of each year, which appears to be his practice, and charged interest on the balance. Whether he allows interest, is not so manifest. It is to this the first exception applies; and there can be but little question, that such a practice, if sanctioned by the court, would lead to great injustice. If there had been an express agreement between them, that would be relieved against as inconsiderate and oppressive. Thus when a mortgagee inserts a covenant, in the mortgage deed, that if the interest be not punctually paid at the day, it shall from that time, and so from time to time, be turned into principal, and bear interest, equity relieves the mortgagor against such a covenant, as unjust and oppressive. *Sir Thomas Mear's case*, cited in *Cases Temp. Talb.* 40, 42. *Salk.* 449. and *Thornhill v. Evans*, *Atk.* 330.

Here, to make the most of it, it amounts to an implied agreement, from the practice of *Patterson*, and the knowledge, and therefore implied consent of *Williams*. Sanction this, and it is made the direct interest of this class of people, to encourage their dilatory customers to run up their accounts with them, knowing that until the time comes for pressing a settlement, their accounts will be drawing compound interest. When the day of settlement comes, the debtor finds himself, unacquainted as he generally is with the operation of this principle, in debt to perhaps double the amount he supposed. A judgment and mortgage is the conse-

(Graham, surviving Administrator of Williams, v. Williams.)

quence, and finally it ends in his property being sold for half its value. To protect the ignorant and unwary, public policy requires, that courts of justice should put the seal of reprobation on such implied, unjust, and oppressive agreements.

When there is a settlement between them, and a promise to pay interest, the attention of the debtor is called to the state of the account. If he is wronged, it is his own fault; he then goes on with his eyes open.

Interest, in *Pennsylvania*, has already been extended further than in *England*, or in most of the states of the Union, and it is time for us to pause and consider, whether it has not been sufficiently extended.

I would wish to be considered as confining my opinion to a running account, and not interfering with the practice of dealing at six months' credit, which has generally obtained between the merchants of a sea-port, and the country.

It is more easy to determine what interest shall not, than what shall be allowed, in the case of a running account. It is usually to be left to a jury, under all the circumstances. The Orphans' Court have thought, that interest only should be allowed, from three months after the last item, on the debit side of the count; in which there is no error.

The court, therefore, order and decree that *John Graham*, surviving administrator of *John Williams*, pay to the legal representatives the sum of three hundred and seven dollars and fifty cents, the balance of the administration account, in his hands not distributed; and that the appellant pay the costs of this appeal.

[SUNBURY, 1827.]

CHRISTY, Administrator of CUSTER, *against* REYNOLDS,
Assignee of REYNOLDS, Assignee of MONAHAN.

IN ERROR.

In an action on a single bill, given for land sold, the obligor may give in evidence judgments against the grantor, previous to the deed under which the land has since been sold; whether the clause of warranty in the deed be general or special.

ERROR to the Court of Common Pleas of *Mifflin* county.

The suit was brought by *Levi Reynolds*, assignee of *David Reynolds*, who was assignee of *M. M. Monahan*, against the plaintiff in error and defendant below, *Daniel Christy*, executor

(Christy, Adm. of Custer, v. Reynolds, Assignee of Reynolds.)

of *Samuel Custer*, to recover the amount of a single bill, dated the 1st of *June*, 1822, made by *Samuel Custer*, the intestate, in his lifetime, for the payment of fifty-six dollars and eighty-seven cents, interest from the 1st of *June*, 1820, to *M. M. Monahan*, and assigned by him to *David Reynolds*, and by him to the plaintiff.

The defendant proved, that this single bill was given in consideration of a tract of land, sold by *David Reynolds* to *Samuel Custer*, situate in *Mifflin* county, and then gave in evidence, a deed dated the 28th of *June*, 1820: *David Reynolds* and wife, to *Samuel Custer*, for some land in consideration of two hundred and eighty-three dollars, with covenant of general warranty, as follows: "And the said *David Reynolds*, for himself, his heirs, executors, and administrators, doth covenant, promise, grant, and agree, to and with the said *Samuel Custer*, his heirs and assigns, by these presents, that he, the said *David Reynolds*, and his heirs, the said above-mentioned and described message, or tenement and tract of land, hereditaments, and premises, hereby granted or mentioned, or intended so to be, with the appurtenances, unto the said *Samuel Custer*, his heirs and assigns, against him, the said *David Reynolds*, and his heirs, and against all and every other person or persons whomsoever, lawfully claiming or to claim from or under him or them, or any of them, shall and will warrant, and for ever defend, by these presents." The defendant then offered in evidence, judgments obtained against *David Reynolds* in the Court of Common Pleas of *Mifflin* county, previous to the 1st of *June*, 1820, to the amount of one thousand dollars, which were a lien on the said land at the time of its sale by *Reynolds* to *Custer*, as above-mentioned, and which were regularly revived, and the lien on the said land continued up to the time of trial: to which evidence the plaintiff objected, and the court rejected it, and sealed a bill of exceptions. The defendant then offered in evidence, a judgment obtained against *David Reynolds* in the Court of Common Pleas of *Mifflin* county; in *November*, 1821, a *feri facias* issued upon the said judgment, and levy upon the land, for which the single bill upon which this suit is brought was given: an inquisition annexed to the *feri facias*, condemnation, and a *venditioni exponas* issued out of the same court, by virtue of which, the land aforesaid was sold to *M. M. Monahan* by the sheriff of *Mifflin* county: and a deed from *George McCulloch*, the sheriff of *Mifflin* county, dated *January*, 1827, and acknowledged in the Court of Common Pleas of *Mifflin* county, the 17th of *January*, 1827, to *M. M. Monahan* for the land, in consideration of which the single bill in question was given. The plaintiff objected to the evidence: the court rejected it, on the ground that the judgment and all subsequent proceedings thereon, were long since the sale and conveyance of the land by *David Reynolds* to *Custer*: and the defendant tendered a bill of exceptions.

(Christy, Adm. of Custer, v. Reynolds, Assignee of Reynolds.)

Huling and Fisher, for the plaintiff in error.—The covenants were against a known incumbrance. *Sugd. Vend.* 6. The vendor must not conceal incumbrances; but no relief is given against a patent defect. *Sugd. Vend.* 349. 1 *Fonb.* 363, 364, *in note*. Every man is bound to take notice of a judgment or incumbrance of record. *Loudon v. Fuhrman*, 13 *Serg. & Rawle*, 390, 391.

Blythe, contra, relied on the case of *Steinhauer v. Witman*, 1 *Serg. & Rawle*, 438, as in point, to show that the defendant might give in evidence the entire failure of consideration.

The opinion of the court was delivered by

HUSTON, J.—The defendant, who was plaintiff below, gave in evidence a single bill for fifty-six dollars and eighty-seven cents, given by *Samuel Custer*, in his lifetime, to *M. M. Monahan*, dated the 1st of *June*, 1822, with interest from the 1st of *June*, 1820, and assigned until it came to the plaintiff.

The defendant proved, that the single bill was given in part consideration of a tract of land, sold by *David Reynolds* to *Samuel Custer*, and then gave in evidence, a deed dated the 28th of *June*, 1820, *David Reynolds* to *Samuel Custer*, with a clause of general warranty, as follows: "And the said *David Reynolds*, for himself, his heirs, executors, and administrators, doth covenant, promise, grant, and agree, to and with the said *Samuel Custer*, his heirs and assigns, by these presents, that he, the said *David Reynolds*, and his heirs, the above-mentioned and described mesuage and premises, hereby granted or mentioned, or intended so to be, with the appurtenances, unto the said *Samuel Custer*, his heirs and assigns, against him, the said *David Reynolds*, and his heirs, and against all and every other person or persons whomsoever, lawfully claiming or to claim from or under him or them, or any of them, shall and will warrant, and for ever defend." I have copied the language of the record, when I call this a *general warranty*; but why it was so called in the court below, or so named in the record, I will not pretend to conjecture. It is not a *general warranty*. And it is the very case of *Steinhauer v. Witman*, 1 *Serg. & Rawle*, 438; and *Hart v. Porter*, in 5 *Serg. & Rawle*, 201, in both of which, and in many other cases, it is expressly decided, that if an adverse title or incumbrance is discovered before the money is paid, such title or incumbrance is a defence against the payment of the money. And, in *Parke v. Kelly*, 13 *Serg. & Rawle*, 165, it is expressly decided, that incumbrances, when discovered are a defence against payment of the purchase money, to the amount of the incumbrances, where there is a general warranty in the deed.

The law in *Pennsylvania*, as settled in the above cases, is founded on the plainest principles of justice; and has been too solemnly and too often decided to be ever shaken. The law is otherwise in *England* and *New York*: it was not, however, so in *England* at

(Christy, Adm. of Custer, v. Reynolds, Assignee of Reynolds.)

the middle of the last century. Their system of conveyancing is peculiar to that country; and to apply it to *Pennsylvania*, where our habits and modes of transfer agree in nothing, except that they are written, would produce the most monstrous injustice.

The case of *Loudon v. Fuhrman*, 13 *Serg. & Rawle*, 386, does not in the least impugn those cases cited. There was an express warranty against incumbrances to the heirs of the grantor's father: it was shown that certain legacies were charged on the land; it does not appear by the case, that they had become due; or that they, if due, were unpaid: it barely decides, that if the parties agree that money shall be paid at a certain day, although a certain incumbrance known and specified should remain unsatisfied, in that case the incumbrance may not be a defence, if the owner of the incumbrance is not pressing for his money; but I apprehend, and the language of the case warrants me in saying, that even in such case, if the incumbrance was put in a way of collection, and execution for it on the land sold, it would be a defence. In the language of *Hart v. Porter*, the law would not compel the purchaser to pay money to-day which he might sue for to-morrow.

There was error in rejecting the evidence, and therefore the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE, 1827.]

TOD, Administrator of BEALE, *against* GALLAGHER.

IN ERROR.

The vendee of land, in a suit for the consideration money, may defalk the amount paid by him for existing incumbrances: but he is liable to the vendor for any balance beyond that.

WRIT of error to the Court of Common Pleas of *Mifflin* county, in a suit brought by *Thomas Tod*, administrator of *Thomas Beale*, against *Robert C. Gallagher*, in which a verdict and judgment was rendered in favour of the defendant.

It was an action of debt on two notes, of one hundred dollars each, given by *Gallagher* to *Thomas Beale*, in his lifetime, dated each, 30th of *June*, 1821, one payable on the 1st of *April*, 1822, and the other on the 1st of *April*, 1823.

Plea, payment with leave, &c. The defendant proved, that the notes were given in part payment, for a house and lot in *Mifflin* town, sold by *Beale* to *Gallagher*, for three hundred and fifty dollars, by article of agreement, dated 17th of *February*,

(Tod, Administrator of Beale, v. Gallagher.)

1821, and a deed from *Beale to Gallagher*, with general warranty, dated *June 20th, 1821*; after which, on the 30th of *June, 1821*, *Gallagher* gave the notes in question. *Gallagher* entered into possession of the house and lots, and is still in possession.

The defendants then showed that the house and lots had been bought by *Beale* from one *Daniel Crawford*: that while *Crawford* owned the property, a judgment was entered against him in favour of *E. Banks*, for one hundred and thirty-four dollars and twenty-two cents. After *Gallagher's* purchase, and after he took possession, a *fiery facias* on this judgment was levied on the house and lots; and they were sold and purchased by *Gallagher* for one hundred and fifty dollars. The paper book stated they were not sold until after the two notes of one hundred dollars from *Gallagher* to *Beale* fell due; but it was alleged this was contrary to the fact, and that the sale took place before the last note was due.

The plaintiffs admitted the defendant was entitled to credit for the amount he paid for the incumbrance: viz. one hundred and fifty dollars, and claimed only the balance due on the notes after allowing such credit; and asked of the judge to charge the jury, that the plaintiff was entitled to recover such balance. In the abstract of the charge, it was stated, "this the court refused, and charged the jury, that by the article a clear deed was to be made on the payment of three hundred and fifty dollars; these were mutual and dependent covenants. There being a lien and incumbrance on the land, when the payments were due, *Gallagher* might have refused to give his notes until that incumbrance was removed. I do not think the position of the plaintiff's counsel is sound; and it is my opinion, and that of the court, that under the evidence in the cause, the plaintiff cannot recover."

The opinion of the court was delivered by

HUSTON, J.—Seldom has a cause been brought before a court more defectively; the judge takes no notice of the facts: viz. that notes had been given, or that a deed had been given; but says that *Gallagher* was not bound to give his notes. Neither the article nor the deed are before this court; nor are they in possession of the counsel. What covenants are in the one or the other, is unknown, except in the vague statement above given. It happens much too often, that causes are brought before us so defectively, that our decision must be unsatisfactory to a certain extent.

Whether there was any warranty in the articles, or, if any, to what extent, it left too uncertain. How far the deed and notes given put an end to, and extinguished the articles, is not so precisely known as could be wished; and whether the covenant of warranty in the deed was a warranty of seisin, against incumbrances, or for quiet enjoyment, or of all of them, is not apparent.

(*Tod, Administrator of Beale, v. Gallagher.*)

The existing incumbrance is the alleged breach of that covenant. Now an incumbrance is a breach of such covenant, precisely to the amount of the incumbrance: if the incumbrance is two hundred dollars, and the price of the land two thousand dollars, it will not enable the purchaser, in ordinary cases, to recover back his two thousand dollars, if he has paid it; or to retain the two thousand dollars, if unpaid. An adverse title to the whole property may enable the party to retain all the purchase money; an adverse title to one-fourth of it, may enable him to retain in proportion to its extent and value. In this case, a part of the money being unpaid, *Gallagher* might have paid off the incumbrance, and retained its amount, but no more than its amount: if the incumbrance had exceeded the money due on the whole price of the property, it might have enabled him to resist the payment of any more, or to have recovered the whole as part of what he had paid.

There may be cases where a purchaser buying property incumbered by liens not yet due, may accept a covenant against them, and agree to pay the purchase money, although they remain a lien on the land: but where this is not expressly, or at least, evidently the contract of the parties, a purchaser may always pay off a lien and retain its amount out of money due the vendor. *Poke v. Kelly*, 13 *Serg. & Rawle*, 165. I speak of liens reduced to certainty of amount, admitted and due. If the purchaser does not pay them off, but suffers the property to be sold, and it goes *bona fide* to a stranger, he may or may not be released from the payment of any more money to the vendor, according to the contract and the facts and circumstances of the case. Here the incumbrance cost him less than he owed the representatives of *T. Beale*. The property is not gone to a stranger; he still has it. Justice requires he should have a credit for what this incumbrance cost him, and the same justice requires he should have credit for no more than it costs him.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE 20, 1827.]

BREYFOGLE *against* BECKLEY.

IN ERROR.

Where a party takes the deposition of a witness, and reads so much of the examination as supports his case, and stops, the other party may, generally speaking, read the rest of the deposition which is in his favour.

A commission to examine witnesses was directed to *George Dunlair*: the depositions are not admissible if taken by *George Dunbar*, though there is reason to believe they were taken by the person intended.

A bill payable on demand, carries interest only from the time of demand.

THIS was a writ of error to the Court of Common pleas of *Northumberland* county, in a suit brought by *Jacob Breyfogle*, the plaintiff in error and plaintiff below, against *Daniel Beckley*, the defendant in error and defendant below.

The opinion of the court was delivered by

HUSTON, J.—The plaintiff in error, who was plaintiff below, brought against the defendant an action of debt on a single bill for two hundred dollars, dated in 1805, payable *on demand*. Many depositions were taken by the parties, and filed in the cause. The defendant, who had pleaded payment with leave, &c., endeavoured to make out a case of this kind: That the plaintiff, in 1805, lived in *Berks* county, and, becoming dissatisfied with his family, determined to desert them, and did so; that being the owner of a house and sixteen acres of land, incumbered by mortgage, and one or more judgments, he appointed the defendant to act as his agent in his absence, and gave him directions to buy in the property when it should be sold by the sheriff, unless it was bid to a fair price by others; if he bought it in, to sell it and pay plaintiff's debts and account for proceeds. Whether this two hundred dollars was to secure a debt due precisely from *Beckley*, or evidenced a loan of money then made, or was for money left with him expressly to enable him to buy in the property, if it was likely to be sacrificed, was disputed, and did not appear very clearly in the cause.

The defendant wished to prove that he expended the whole two hundred dollars in paying the plaintiff's debts: this was objected to, as not admissible in this case. It has been decided in 4 *Serg. & Rawle*, 309, that where a debtor is directed to pay what he owes to a creditor of his creditor, it is to be considered as paid to his creditor; and may, if fully proved, be given in evidence under the plea of payment: it is, in fact, a payment, for he who pays any debt by my direction pays me.

The plaintiff took, among others, the deposition of a man who was a witness of the execution of the single bill, and who proved

(Breyfogle v. Beckley.)

it. The witness then proceeded to state that the plaintiff, *Breyfogle*, had business with the witness about a debt he owed, and told him he had appointed *Beckley* to do his business, and that he understood *Beckley* aided in *Breyfogle's* business. This latter part of the deposition the plaintiff did not read, and the defendant offered to read it, and it was admitted, and the plaintiff excepted. Generally where a witness swears to what is understood, it is objectionable; and, where the party who took the deposition offers to read it, it will be rejected; but where a witness for one party is examined, and the party reads so much of his deposition as supports his own case and stops, the other party may read the rest of the deposition, which is in his favour, unless there is some stronger objection to it, than that it is somewhat vague. I do not say it can always be done, nor is it easy to lay down a rule so specific as to meet every possible case. There was no error here, for the first part of the sentence, viz. what *Breyfogle* told him, was clearly evidence against *Breyfogle*, and the latter under these circumstances might go along with it. The plaintiff had entered a commission to take the deposition, and named his commissioner: the commission was directed to *George Dunlair*: the prothonotary swore that when the rule for a commission was entered, the name being an unusual one to him, he asked the attorney what the name was? who repeated it. The prothonotary asked him again, and he answered by repeating the letters distinctly, *D u n l a i r*. The commission was executed and returned by *George Dunbar*, and was objected to, as not being executed and returned by the commissioner named.

I have no doubt that the client had written to his lawyer a letter naming the commissioner, but writing the name so indistinctly, that the lawyer mistook it. I also suppose the commission was really executed by the very man *Breyfogle* intended, but whose name his attorney mistook in entering the commission. I have tried to support the commission, but I believe it cannot be done without breaking down all the rules on this subject. It is not the same name, not sounding the same: if it were, I would be for supporting it, though differently spelled; it would be safer to direct a commission, leaving the name of the commissioner blank: there may be a man of the name in the commission. There was no error in rejecting the commission.

The single bill was payable on demand, the court directed the jury that it bore interest only from the time of the demand; the law seems to be so settled, and moreover, in this case, it fully appeared, that when it was given, the plaintiff had determined to go from his place of abode, but did not know where, nor when he would return. We hear no more of him until 1818, when he comes back. Under such circumstances, the charge was clearly right.

Judgment affirmed.

[SUNBURY, 1827.]

FASHOLT *against* REED.

IN ERROR.

Judgment against one who has articted to sell, but made no deed, nor received the whole purchase money, is a lien on the vendor's interest; and, if the vendee purchase a mortgage made by the vendor prior to the sale, he is justified in having a sale under the mortgage to obtain the title clear of incumbrances, and is to be allowed by the vendor the costs of such sale.

It is settled, that a purchaser by articles, entering and continuing in possession, must pay interest, though there may be cases where the jury would be justified in refusing it.

ERROR to the Court of Common Pleas of *Northumberland* county, in an ejectment brought by *John Fasholt*, the plaintiff in error and plaintiff below, against *John Reed*, the defendant in error and defendant below, and the following were the circumstances appearing on the trial:

On the 11th of *March*, 1816, *John Reed* contracted to sell a tract of land to *Valentine Fasholt*, at the price of eight pounds per acre. *Fasholt* was to pay five hundred pounds on the first day of *April*, when the deed was made: it was to be a good and sufficient deed. The deed was not made at the time appointed. At the execution of the articles, *Fasholt* paid one hundred dollars, and he paid eight hundred dollars in *April*, and other payments at different times, till the 2d of *May*, 1817, when he had paid in all one thousand, five hundred and twenty dollars.

On the 28th of *January*, 1817, a deed from *Reed* to *Fasholt* was executed, and bonds and a mortgage from *Fasholt* for the balance of purchase money were prepared; but none of them delivered, on account of some dispute about the quantity of land, in which *Reed* appears to have been wrong.

At that time, it being discovered there was a mortgage on the land, *Reed* gave a bond with security to *Fasholt*, to indemnify him against the mortgage. All the money secured by the mortgage was not then due. *Fasholt* was in possession. Nothing further appeared to have been done by either party for some time.

To *April* Term, 1822, suit was brought on the mortgage; and at *April* Term, 1823, when the land was exposed for sale, *Fasholt* applied to the plaintiff's attorney, and bought the mortgage, which was assigned to him on the 23d of *May*, 1823. At *August* Term, 1823, the land was sold on the mortgage, and purchased by *Fasholt*, and a sheriff's deed made to him. Between the articles of sale from *Reed* to *Fasholt*, and *August*, 1823, several judgments had been obtained against *Reed* in the Court of Common Pleas of *Northumberland* county.

On the 7th of *July*, 1823, *Reed* tendered the deed to *Fasholt*, the mortgage being then the property of *Fasholt*, and agreed to allow

(Fasholt v. Reed.)

him the amount of the mortgage, and demanded the balance of the money.

Fasholt refused to pay the money, on account of the judgments against *Reed*, and demanded the costs on the mortgage, and claimed an abatement of interest, alleging that he had kept his money idle; and that *Reed*, neglecting to make a deed, was a reason why he should not pay interest. *Reed* insisted, that as the judgments were entered after the date of the articles, and also after the date of the deed, they did not bind the land.

The court below charged the jury, that when a defendant is in possession of the land, he is obliged to pay interest from the time the money becomes due, unless he tenders his money and demands his title, or gives notice that the money is ready. In this case there was no tender of money, and interest is chargeable. The defendant contended, that he ought to be allowed for the costs which accrued on the sale or mortgage. The mortgage was assigned to *Fasholt*, on payment of the debt and interest due upon it. After the mortgage was assigned, or transferred to him, there was no necessity of a sale upon it. To this charge the defendant excepted.

Greenough, for the plaintiff in error.

Bellas, *contra*.

The opinion of the court was delivered by

HUSTON, J.—The law is now settled, that a judgment against a man who by articles has agreed to sell, but who has not made a deed, nor recovered the whole of the purchase money, is a lien on the vendor's interest, and a purchaser under a sheriff, of such interest, will stand in the place of the vendor, be entitled to the money due from the purchaser, and bound to make a deed to the purchaser, according to the articles of agreements. *Reed's* interest in this land was then bound by these judgments; and his deed, executed the 28th of *January*, 1817, but never delivered, did not alter the case.

Under these circumstances, *Fasholt* was justified in having a sale on the mortgage, for the purpose of obtaining a title clear of incumbrances; and, if it had become necessary by the delay and misconduct of *Reed*, ought to have been allowed the costs on the mortgage suit, and sale.

After a verdict claimed for the amount of the mortgage and costs, *Fasholt* claimed an abatement of interest. He proved that he had kept some money by him, as he said, to pay for his land; but he did not know how much he had kept, nor how long he had kept it. There was no proof of a tender by him, and demand of his deed at any time, and nothing said in the record of any money being brought into court. Generally, the person who wishes to stop interest must prove a legal tender, and plead it, and bring the money into court. This was an ejectment to compel the payment of the

(Fasholt v. Reed.)

purchase money, in which the plea of tender was not necessary; but it should have been proved, and the money brought into court.

It has been long settled in this state, that where lands are sold on articles of agreement, and the buyer enters into possession, and so continues undisturbed, he must pay interest; and the mere fact that his deed was not made at the time agreed on, does not stop the interest. There may be cases where he has been harassed or disturbed in the possession, where there has been wilful and vexatious delay, or gross or criminal laches in the vendor, in which it may be left to a jury whether he shall recover interest, and there may be such facts proved hereafter. But, from the evidence in this case, there was nothing on this subject proved which required the judge to leave the question of interest to the jury. But there was error in saying *Fasholt* was not entitled to the costs on the mortgage suit; and for this cause the judgment is reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

END OF JUNE TERM—MIDDLE DISTRICT.

AUG 1

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

WESTERN DISTRICT—SEPTEMBER TERM, 1827.

[PITTSBURG, SEPTEMBER, 1827.]

HAWTHORN *against* BRONSON.

IN ERROR.

Mode of administering equity in *Pennsylvania*.

A vendee of land, by articles not recorded, pays the first instalment, and for near six years takes no further steps to comply with the contract: the vendor then sells to a third person, who was led to believe by the declarations of the first vendee, that he had relinquished the contract, and who goes on to make valuable improvements: if there was no fraud in the second vendee, he is entitled to hold the land against the first vendee; and the latter must look to the vendor for the purchase money he has paid.

A person who had become surety for a vendor to the first vendee, for the performance of his contract, is a good witness for the second vendee, to prove that the former had relinquished his contract.

WRIT of error to the Court of Common Pleas of *Mercer* county.

Ejectment by *James Hawthorn*, the plaintiff in error and plaintiff below, against *Thomas Bronson*, for donation, lot No. 804, containing two hundred acres.

The plaintiff claimed under articles of agreement under seal, between himself and *George Decamp*, dated the 10th of *October*, 1818; the defendant under a deed from *Decamp* and wife to him,

(Hawthorn v. Bronson.)

and *George Shilling*, dated the 30th of *January*, 1824, and recorded the 29th of *September*, 1824.

The articles "witnessed, that *Hawthorn* had purchased from the said *George*, a certain lot of land, (the premises in dispute,) for the sum of five hundred and eighty dollars, in manner and form following, viz. one hundred and fifty dollars in hand, including two demands in favour of *Jonathan Smith* and *Charles Reno*, amounting to about forty-five dollars, and one hundred and thirty dollars, on the 1st of *April*, 1819, provided the said *George Decamp* makes a good and sufficient deed for the said premises; otherwise, payment to be delayed, until title is made; and on the title being made the said *Hawthorn* binds the land by mortgage to the said *George Decamp*, as the surety for the balance of the money, then unpaid, which balance is to be paid by *Hawthorn* in annual payments of one hundred dollars each, until paid; and in consideration of these presents, the said *Decamp* authorizes the said *Hawthorn* to enter on and take possession of the said premises."

At the same time the following bond of indemnity was executed:

"Know all men by these presents, that we *George Decamp* and *Jacob Trout*, of the county of *Mercer* and state of *Pennsylvania*, are held and firmly bound by these presents to *James Hawthorn* of the borough of *Mercer*, in the penal sum of two thousand dollars, lawful money of the *United States*; and we authorize *Thomas J. Cunningham*, or any other attorney of record to appear for us, and enter judgment in any competent court within this commonwealth. Witness our hands and seals this 10th day of *October*, 1818. The condition of the above bounden *George Decamp* and *Jacob Trout* is as follows: if the said *Decamp* performs all the conditions of an article of agreement, attached to this instrument, and bearing even date herewith, then the above obligation to be void; otherwise to remain in full force and virtue. Witness our hands and seals, this date above written.

George Decamp.

Jacob Trout.

On the articles, were the following indorsements.

It is further agreed, that *Hawthorn* is to have twenty dollars, out of the next spring's payment, as a compensation for selling the said land.

George Decamp.

Thomas Templeton.

Received, on the date above, one hundred and fifty dollars on the within contract: witness my hand this 18th day of *October*, 1818.

George Decamp.

Thomas S. Cunningham's deposition was then read, that sometime in the month of *September*, 1824, he, in pursuance of a written authority from *Hawthorn*, tendered to *Decamp* one hundred and ten dollars, being the amount of money due by *Hawthorn* to

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Decamp, on an article of agreement for the tract of land, on which *Thomas Bronson* then resided, and for which this ejectment is brought, and demanded a deed to the said *Hawthorn*, agreeably to said article. He told *Decamp*, that if the money tendered was not enough, he would pay the proper amount. *Decamp* said, "you need make no tender, you need not count the money, I agree you have tendered enough, I will not make a title to *Hawthorn*," or words in substance the same. The tender was made before this suit was brought. That some time before, or about the time *Bronson* was purchasing the said tract of land from *Decamp*, or paying part of the purchase money, he told the said *Bronson* he had better not purchase from *Decamp*, or pay him, as *Decamp* had sold the land to *Hawthorn*, and that *Hawthorn* would give him trouble, or turn him off the land at that time.

John Hawthorn stated, he heard *Thomas Bronson* say he knew of *Hawthorn's* claim of his purchase, but that *Jacob Trout* had told him *Hawthorn* had given up, and that he would not have purchased but for that, and if he were put to trouble, he would blame *Trout* for it. He saw *Bronson* on this land in *February*, 1824. Being cross-examined by the defendant, he stated that he lived there in *November*, 1824; there were considerable improvements; two cabins, and one end of a cabin barn: he could not say how much clear land; it might have been fifteen or twenty acres; he understood *Bronson* had made these improvements. Being re-examined, he stated that in *February*, 1824, *Bronson* said to *Hawthorn*, "I understand you are going to bring an ejectment against me:" *Hawthorn* said he would have to see to himself: *Hawthorn* said, "now *Bronson* you blame me for not taking *Decamp's* deed, and what have you done more than I have done? *Decamp* promised you, as he did me, to get the release of the rest of the heirs, and he has not done it." *Bronson's* reply was, "Yes, we have done more, we have made a tender of the money." *Bronson* then said, "*Trout* had told him *Hawthorn* had given up." *Bronson* said, "I think you told me something like that yourself, and that you would have nothing to do with it." *Hawthorn* said, "it was the deed he would have nothing to do with, without the release of the heirs." *Hawthorn* asked *Bronson*, "what have you done more than I have? you paid two hundred dollars, and I paid one hundred and fifty dollars." *Bronson* said, "we have done more, we have tendered the money." *Hawthorn* said, "did I not give you warning, and tell you not to have any thing to do with *Decamp*: you will find him a troublesome fellow." *Bronson* replied, "yes, you did." I cannot say they mentioned as to what time the former conversation between them, should have taken place.

Samuel McKay testified, that before *Bronson's* purchase, he and the witness had a conversation respecting *Hawthorn's* purchase, but he could not recollect the substance or amount of it; he

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could not recollect *Bronson's* words, but he understood him he did not regard *Hawthorn's* claim.

Thomas Templeton stated, he understood that *Hawthorn* had sold to one *Hunter*. *Trout* seemed to manage *Decamp's* affairs. The contract between *Hawthorn* and *Hunter*, and *Trout* for *Decamp*, was disagreed to by *Hunter*. *Hawthorn* was to get twenty dollars, for finding a purchaser, as was indorsed on the article.

The defendant offered *Jacob Trout* as a witness; the plaintiff objected, but the court admitted him and sealed a bill of exceptions.

Jacob Trout testified, that in *February*, 1822 or 1823, when the deed was shown to *Hawthorn*, he said the title was good enough. This was in *Graham's* house, and on the pavement in this town. *Hawthorn* said he had failed in his contract as to payment. *Hawthorn* advised *Haywood* to take the land, for the title was good, and he had failed in getting his money, and could not pay. *Hawthorn* wanted *Haywood* to take the land from *Decamp*. I told *Bronson* the thing was dead, as *Hawthorn* was cast in *Pittsburg*. I did not tell *Bronson* what took place at *Graham's* before he bought. I made the first bargain with *Bronson*, eighteen months after the conversation at *Graham's*. *Haywood* was at that time at *Graham's*.

William Haywood testified, that in 1819, in the fall, *Hawthorn* asked him if he heard of *Decamp*: witness said not. He said he wished he would come out and make his title; that he had a good opportunity to sell, so as to pay *Decamp* and have a handsome profit to himself, and wished me, if I had an opportunity, to send *Decamp* word. *Decamp* was out the next season, at my house: he said *Hawthorn* had a mind to give up the contract, and wished me to purchase. I agreed to meet him in *Mercer*; we did meet in *Mercer*, and *Hawthorn* was there also. I asked *Hawthorn*, if he had agreed to give up the contract. He said he had sold the land to *Templeton*; that he would go and see him; and, if he would give it up, there would be a compromise: he came back, and said *Templeton* would give it up, brought the article, and *Templeton* said, if *Hawthorn* could sell to better advantage, he was agreed he should. I told *Hawthorn* I understood he considered the title bad, and said if it would not suit him, it would not me. *Hawthorn* told the situation the title was in; that it had been sold by the Orphans' Court of *Ohio*, for the heirs; that it had been sold in this county two or three times for taxes; that *Decamp* had redeemed it as his land by assignment from the purchasers; that he thought all these titles put together it might make a good title; if a large improvement was put on it, it might sink the land. I asked *Hawthorn* why he did not take it, he said he could not pay; he was agreed that I should take it on that day. Mr. *Foster* came to *Graham's*, where we were, and produced certain papers which showed that the heirs were not of age, and that one

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of them was but thirteen or fourteen years of age; after we examined the papers, *Hawthorn* asked me if I would take the land: he had before this urged me to take it. I told him I would not, he said perhaps I was as safe not to take it—*Trout* was there. Being cross-examined by the plaintiff, he stated, that

The arrangement we were attempting to make was to pay a debt *Hawthorn* owed me, and also a debt *Decamp* owed me; the bargain soon broke up after the age of the heirs was discovered. *Decamp* offered to give me security for the title. *Hawthorn* did not offer or speak of giving up his title in any other way than in that arrangement with me. *Hawthorn* did not say the title was good, or that he would risk it after he saw the age of the heirs.

It was admitted the plaintiff was to be considered as having paid one hundred and fifty dollars into court.

The plaintiff requested the court to instruct the jury, 1st that if the defendant bought from *Decamp* with notice of the plaintiff's claim, he could not object to the plaintiff's recovery, for want of the purchase money being tendered to him.

2. That if the defendant had a knowledge of such facts and circumstances respecting plaintiff's claim to this land as might be sufficient to put a prudent man on inquiry, the defendant could not object to the plaintiff's recovery in this case for want of notice.

The court charged the jury as follows:

In this case both parties claim under *George Decamp* by purchase from him; the defendant shows a legal title for this land by deed to himself and *George Shilling*, made and acknowledged on the 30th of *January*, 1824, and recorded on the 29th of *September*, 1824, and before this suit was commenced.

The plaintiff claims by an article of agreement without deed and without legal title. It is true that cases arise where the court will permit a plaintiff to recover land on an article of agreement or even on a parol contract if complied with.

The question to decide here is, is this such a case?

Hawthorn, the plaintiff, had an article of agreement dated the 10th of *October*, 1818, whereon he paid one hundred and fifty dollars. On the 1st of *April*, 1819, a deed was to be made, and one hundred and ten dollars paid as simultaneous acts. But no act was done by *Hawthorn*, showing a disposition to carry on the purchase, no more money paid, no possession taken; but, on the contrary, avowing himself to have become embarrassed by trade, and too poor to go on with the purchase of the land; talking of throwing up his bargain for the land, and wishing another to take it. Thus it remained, when *Bronson*, the defendant, and *Shilling*, bought the same land from *Decamp* on the 30th of *January*, 1824, and got the deed. The defendant went into the woods to clear, build, and make improvements. The evidence is, that *Bronson*, in *November*, 1824, when this suit was brought, had two cabin houses, the end of a barn, and about fifteen or twenty acres of cleared land, and

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had his deed recorded on the 29th of *September*, 1824, and after this *Hawthorn* brings his suit; after the legal title to the land had become vested in *Bronson* and *Shilling*. He tenders one hundred and ten dollars to *Decamp*, some time in *September*, 1824, but whether before or after *Bronson's* deed was recorded, does not appear.

The question for the court and jury, to decide is, does the plaintiff come into court with such a clear and pure equity that he is entitled to recover on his article against the legal title, possession and valuable improvements? We say he cannot recover the land, but should be turned to his action against *Decamp*, to recover back the money with such damages as he may be entitled to, *unless the jury believe there was combination between Decamp and Bronson to cheat and defraud Hawthorn by the purchase; and this question of fraud is the chief fact for the jury to decide.* The plaintiff's counsel contend there was such combination and fraud, and that there was full notice to *Bronson* of *Hawthorn's* right to the land. You will judge of the evidence on this subject connected with the law on the subject of notice.

1. If *Hawthorn* had got his article of agreement recorded, that would have been full notice.

2. If he had taken possession and made improvements, that would be notice without recording the article.

3. Or there may be actual notice of the subsisting right to the land; but this notice is not to be made out by mere implication from circumstances, nor from rumour or report, it must be made out by clear proof of actual notice. *The clear notice required by law, is actual, has a real form, to be established by direct proof, by a person authorized to give such notice.* The evidence on this subject, is the deposition of *J. Cunningham*, esq.: he does not undertake to say when that notice was given, whether when *Bronson* bought, or was about buying, or when about paying some money on his contract. And also the testimony of *John Hawthorn*, (here the judge read his testimony.)

There is no proof of notice to *Shilling*. This question of notice and of fraud is for your decision, but there is so little proof of fraud in this case, that the court do not see which party is most chargeable with it; the charge may be as strongly retorted on the plaintiff. He talked of his being embarrassed and unable to go on with the purchase; pressed *Haywood* to buy; doubts being suggested to him as to title, he replies, that with all the titles together, a man that was able to go on and make improvements would make the title good. He lays back; makes no tender till *Bronson* has improved the land, and this improved the title according to his notion, and now wishes to take it from him, thus improved and enhanced in value. He afterwards observed to *Haywood*, as to the title, "May be you are as well without it;" and still contends as his excuse that the title of *Decamp* was bad. If so, why does he

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want now to take the land with so bad a title? unless it is that he conceives even the title is improved by *Bronson's* possession and improvements. The relinquishing the notion of holding *the land* on account of the badness of the title, and of the plaintiff's inability to pay for it, is a different thing from a total relinquishment of the article with *Decamp*, and of the plaintiff's rights under it. We think this attempt of the plaintiff, now to take the land, and improvements and improved title from *Bronson* without tendering a cent to him, has very little equity in it, unless you believe there was fraud or combination to cheat *Hawthorn*; in that case, there may be such an equity as to entitle the plaintiff to recover. There is no proof of notice to *Shilling*, who appeared (by the plaintiff's own showing) to be a purchaser for a valuable consideration. *Bronson* had heard of *Hawthorn's* contract, and had heard *it was dead*, and that he need not regard it. *If you believe that Shilling and Bronson made their purchase under the idea and belief that Hawthorn had given up the intention of holding the land, and that there was nothing unfair in their conduct, then, as they had the legal title, Hawthorn should have tendered the money to them (Bronson and Shilling,) and not Decamp, and he cannot recover without such tender.* It is material that the court know the plaintiff has another remedy and has taken a bond as security for it. If you should find for the defendant it does not preclude *Hawthorn* of his right to recover back the money he paid *Decamp*, and interest and damages if entitled to it for breach of the article. He has that remedy on the article, and a bond with *Trout* as security, which he may still pursue.

To this charge the plaintiff excepted.

The jury gave a verdict for the defendant, and judgment was rendered accordingly.

The following errors were now assigned:

1. The receiving *Jacob Trout* as a competent witness.
2. The court erred in charging the jury, "The plaintiff could not recover the land, but should be turned to his action against *Decamp*, to recover back the money with such damages as he may be entitled to, unless the jury believe there was combination between *Decamp* and *Bronson*, to cheat and defraud *Hawthorn* by the purchase, and this question is the chief fact for the jury to decide."
3. In charging the jury, that notice "is not to be made out by mere implication from circumstances, nor from rumour nor report. It must be made out by clear proof of actual notice. The clear notice required by law is actual, has a real form to be established by direct proof by a person authorized to give such notice."
4. In charging the jury, "There is no proof of notice to *Shilling*."
5. In charging the jury, that "We think this attempt of the plaintiff now to take the land, and improvements, and improved

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title from *Bronson*, without tendering a cent to him, has very little equity in it, unless you believe there was fraud or combination to cheat *Hawthorn*, in that case there may be such an equity as to entitle the plaintiff to recover."

5. In charging the jury, "If you believe that *Bronson* and *Shelling* made their purchase under the idea and belief that *Hawthorn* had given up the intention of holding the land, and that there was nothing unfair in their conduct then, as they had the legal title, *Hawthorn* should have tendered the money to them (*Bronson* and *Shelling*), and not to *Decamp*, and he cannot recover without such tender."

7. In charging, "That it was material that the court knew the plaintiff had another remedy, and had taken a bond as security for it. If you should find for the defendant, it does not preclude *Hawthorn* of his right to recover back the money he paid *Decamp*, and interest, and damages, if entitled to it, for breach of the article."

8. The court did not answer the first question proposed by the plaintiff's counsel.

9. The court did not answer the second question proposed by the plaintiff's counsel.

Pearson, for the plaintiff in error.

1st Error.—In receiving the testimony of *Jacob Trout* there was error. 11 *Serg. & Rawle*, 179.

2. On this error he cited *Newl. on Cont.* 504, 510. 7 *Atk.* 275. 3 *Ves* 478. 2 *Fonbl. Eq.* 151. 5 *Serg. & Rawle*, 261. A purchase with notice of an unregistered deed is fraudulent, and the first deed preferred. *Jackson v. Burket*, 10 *Johns.* 487.

3. Charge, that notice must be given by a man authorized to give this notice. If one has notice, it is no matter how he received it. Notice to an agent, is notice to the principal. 9 *Johns.* 162.

4. In the charge that there was no proof of notice to *Shilling*. Actual notice to any purchaser, is implied notice to the other. 4 *Mass. Rep.* 537.

5. Charge, that the plaintiff had no equity, unless there was *fraud and combination to cheat him*. We say the tender of the balance due from *Hawthorn*, might have been made either to *Bronson* or *Decamp*. *Yost v. Martin*, 3 *Serg. & Rawle*, 423.

6. Charge, that if *Bronson* purchased, *believing* that the title was in *Hawthorn*, and had been guilty of no fraud, the tender of the balance due from *Hawthorn*, should have been made to *Bronson*, and not to *Hawthorn*. The *belief* of *Bronson* was nothing to the purpose. If he had *notice*, it was immaterial what he believed.

7. We say, if *Bronson* purchased *with notice*, the plaintiff had a right to recover against him, and was not put to his remedy against *Decamp* on his bond.

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8. The principle of this error has been spoken to before, in discussing the other errors.

9. Not spoken to by Mr. *Pearson*.

Banks, for the plaintiff in error, cited the following cases: 1 *Atk.* 470, and 2 *Binn.* 501, on the subject of notice. 4 *Binn.* 146, 147, 148. *Per* YEATES, J. I do not agree that notice must be given by the party interested.

Foster, for the defendant in error.—The plaintiff stands on an *equitable* claim. We contend that the plaintiff could not have obtained relief in equity; and, therefore, this charge was substantially right.

1st Error.—Was *Trout* a competent witness? We say he was. If *Trout* had an interest in this cause, it was that the plaintiff should recover: then he offered to swear *against his interest*, in defeating the plaintiff. This verdict would be no evidence, in a suit by the plaintiff, against *Decamp* and *Trout*, on their bond. Before I speak to the errors assigned in the charge, I will read the evidence. (Mr. *Foster* then read the evidence from the record.) The plaintiff was to have paid *Decamp* one hundred and thirty dollars in *April*, 1819, which he never offered to pay till *September*, 1824. In *September*, 1824, *T. S. Cunningham*, agent for the plaintiff, tendered the balance due to *Decamp*, who refused to receive it. The defendant purchased in *January*, 1824, and had made improvements in the mean time; viz. built a house and barn, and cleared twenty acres of land. If one has trifled, or been backward in performing his part, equity will not give him a specific performance. 1 *Fonbl.* 591. If, on the whole evidence, the plaintiff was not entitled to recover, this court will not reverse the judgment for a small slip of the judge, even granting there was a slip, which I do not admit. When one purchases with notice of a prior agreement to sell, the law implies a fraudulent combination between him and the vendor, and this was what the judge meant, when he said there must be evidence of a fraudulent combination. In this case, there was no notice, actual or constructive. A binding notice, must be given by one *interested* in the land. The assertion of a *stranger* is not notice. *Sugd. Vend.* 490. *Constructive* notice: what is sufficient to put a prudent man on inquiry, is constructive notice. *Ib.* 492. It was a trick in the plaintiff to make a tender to *Decamp*, after he knew *Decamp* had conveyed to the defendant. 2 *Fonbl.* 151, note.

Two of the errors assigned are, that the court gave no answer to certain questions. But it will appear that these questions were answered, *in substance*, in the course of the charge.

Banks, in reply, for the plaintiff in error.

1st Error.—*Competency of Trout*. He was incompetent, because called to prove that the plaintiff had relinquished the contract with *Decamp*, for the performance of which, by *Decamp*,

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Trout was bound in a bond to the plaintiff, as security for *Decamp*.

Charge of the Court.—There was an essential error, in saying that unless there was a combination between *Decamp* and the defendant to cheat the plaintiff, he ought not to recover. This was a general position, which must have misled the jury; and it is not for this court to examine the evidence, and decide on which side the equity lies, or *whether notice was proved*. There was error, in saying that notice is not good, unless given by a person *authorized* to give it. *Per* Chief Justice: if notice is had *in any way*, it is sufficient. 5 *Serg. & Rawle*, 261. 2 *Binn.* 501. There was error in saying, that the not having given notice to *Shilling* would prevent the plaintiff's recovery; because *Shilling* was no party to this suit. There was error, in saying that *Bronson* had no equity in an attempt to take the land from the defendant, without any compensation, unless the jury think there was *combination* between the defendant and *Decamp*: it ought to have been said, unless the defendant purchased *with notice*. In *Yost v. Martin*, Judge Gibson said, that in case the legal title is purchased *with notice* of an outstanding equity, the tender of what is due by the *prior purchaser*, may be made either to the vendor, or the holder of the legal estate who purchased with notice. The judge did not say, throughout his whole charge, that the plaintiff should recover, if the defendant purchased *with notice*. There was error, in leaving two of our questions unanswered.

The opinion of the court was delivered by

DUNCAN, J.—The equitable action of ejectment, in this state, forms a considerable branch of the law. From the nature of our original titles, settlement rights, warrants, and applications, all imperfect rights, so variant in their circumstances from other countries, our courts of justice have been obliged to form a system of laws adapted to this species of title, and accommodated to all its circumstances, and which perhaps could not, after all our experience, be changed to advantage; and which, indeed, ought not to be changed, however specious the reason might be, as it would tend to destroy all security of title, and introduce new confusion, which nothing but a steady adherence to decisions can prevent. And when to this is added, that in general the people contract by articles for payment by instalments, and the legal title seldom made until all the purchase money is paid, and the frequent assignment of these articles, we ought not to be surprised at the numerous complicated cases which arise in our courts of law and equity; for they are courts of law and equity distributing justice by the same medium—the instrumentality of a jury. In *Pennsylvania*, equity is law. Courts give the equitable principle to the jury, as they lay down the legal principles. The facts are for the decision of the jury, as

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all contested facts must be; but whether, on any state of facts found by the jury, the party is entitled to equity, and the mode, manner, and extent of relief, is for the court. If these principles were well understood and firmly acted upon, the time consumed in the trial of these vexatious causes would be greatly shortened, and justice would be advanced.

The rules of equity are as binding as the rules of law. Applying these rules to the case under consideration, has there been any error committed on the trial of this cause, substantial error, which has injured the plaintiff? I think there has not, and that the plaintiff has not shown a case entitling him to call on the defendant to surrender up his possession and improvements, the labour of years, and the title for which he has paid his money, and that whatever remedy he may have is against *Decamp*.

In executory contracts, such as this, time is generally an important circumstance. A vendor is not obliged to keep his property unimproved and unproductive, until it pleases the vendee to proceed. There should be no culpable dilatoriness, no backwardness, no shifting off, on his part; there should be no waiting for the rise of the lands; no catching at improvements made by subsequent innocent purchasers, who, though they may have had some notice of the contract, yet, at the same time may be informed, and have good reason to conclude, that it has been abandoned; given up, from inability to pay; from unwillingness to accept the title; in a country like this, where new land is plenty, and where all are in state of motion and emigration, one, after the lapse of years, would consider that the purchaser had suited himself with another place. If we had a regular Court of Chancery, proceedings by bill and answer, and, if a case like the present were brought before a Chancellor, he would without difficulty dismiss the bill, and leave the party to his remedy at law, to recover back the money from the vendor.

From the evidence, it would appear that from the time of the first payment, until after *Bronson* and *Shilling's* purchase, payment of the money, deed, and valuable improvements, no movement was made by the plaintiff to complete the contract. He was desirous of getting rid of it; he was poor and embarrassed, and not able to pay for it, and did not like the title; and, it would seem his own opinion was that the title, though defective, yet the owner might be improved out of it; and, when the improvements are in a state of forwardness, by *Bronson*, he steps forward, and says he will take the title, because *Bronson* has improved it, because the value of his improvements have sunk the land and improved the title.

I do not think it necessary to travel over the whole case in detail, or to answer the minute objections made to the charge of the court; because I am satisfied, that, on the hinge on which the cause turned, the charge of the court was correct and accurate; and embraced in

(Hawthorn v. Bronson.)

one strong and impregnable position, the whole merits of the case. "The question for the court and jury," says the presiding judge, (and he could not have expressed it better,) is, "Does the plaintiff come into court with such a clear and pure equity, that he is entitled to recover on his articles, against the legal title, possession, and improvements? We say he cannot recover the land, but should be turned to his action against *Decamp*, to recover back the money, with such damages as he may be entitled to, unless the jury believe there was a combination between *Decamp* and *Bronson* to cheat and defraud *Hawthorn* by the purchase; and this question of fraud is the chief fact for the jury to decide." I cannot discover the *scintilla* of equity in favour of the plaintiff's claim; it could not be, indeed, in a court of equity, that he, lying by as he did for years, not only lying by, but declaring his inability to complete the contract, the defect in the title, (the only cure for which, as he said, would be to improve the owner out of his land,) acknowledged by him, that he should, after the purchase by *Bronson*, payment of the purchase money, conveyance, and valuable improvements, pounce down upon him, and sweep all this away, even the very purchase money; for the tender to *Decamp* was nothing, the demand of the conveyance from him nothing, because *Bronson* was the notorious owner of the legal title with his deed on record; but, if he had tendered the money to him, and demanded the conveyance, I do not think that any court of equity would have compelled him to convey.

This disposes of the whole case on the merits. There is, however, the bill of exceptions to the reception of *Trout* as a witness, which remains to be disposed of. *Trout* was a competent witness for the defendant. What interest had he in the event of the trial? If he had any, it would be in favour of the plaintiff; for if the plaintiff recovered, then he would be discharged of his liability to *Hawthorn*. *Decamp's* obligation would be complied with, and *Hawthorn* would have the title and the possession. But, if he did not recover in the ejectment, *Decamp* would continue responsible; so that it was clearly *Trout's* interest to sustain the plaintiff's action, and not to destroy it; because, by destroying it, it left him open to an action on the security for *Decamp*.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 11, 1827.]

KELLY *against* ABERS and others.

APPEAL.

If A. settles on land, and makes improvements, and obtains title, notwithstanding a notice from B., that he (B.) claimed as tenant of C., B. cannot, after a lapse of time, finding C's. title bad, set up against A. another title in himself.

APPEAL from the decision of HUSTON, J., sitting in the Circuit Court of *Allegheny* county, in which a verdict and judgment were rendered for the defendants.

Baldwin, for the plaintiff.

Forward, *contra*.

The opinion of the court was delivered by

ROGERS, J.—This is an appeal from the decision of Justice HUSTON, in the Circuit Court of *Allegheny* county, under the following circumstances:—The plaintiff, *Neal Kelly*, settled on the land where he now resides, in the year 1811, and has lived on it ever since. He has a cabin, stable, and thirty acres of land cleared. In *June*, 1815, one *Johnstone* (who had bought an old improvement, which had been abandoned long before *Kelly* came to the land) having no title, induced *Kelly* to take a lease under him, for eleven years. In *June*, 1815, *Johnstone* made a survey, including the land in question, at which *M'Murray* was present. In *April*, 1815, *M'Murray* took out a warrant for two hundred acres of unimproved land, surveyed it in *July*, 1815, and obtained a patent in 1817. *Kelly* did not enter a *caveat*. Prior to 1815, *Kelly* had done some work in a piece of hollow ground, and made some heaps of brush; he was present when the deputy surveyor executed *M'Murray's* warrant on that part of the land, and objected to his taking the piece of bottom land into his survey, claimed it, and said he had done the work. In *June*, 1817, he sued *Abers*, the defendant, who had purchased from *M'Murray*, for hauling rails from this place, and said he was bound by *Johnstone's* lease, to take care of the land. He said he claimed *Johnstone's* survey. It is admitted, that *Johnstone* had no title.

About the year 1822, *Abers* built a cabin near the bottom piece, and cleared twenty or thirty acres. This is the land in dispute. In 1817, there were no improvements on the land when *Kelly* claimed *Johnstone's* survey. *Gilland* purchased *Johnstone's* rights, at a sale for taxes, and *Kelly* became a tenant under him. In a suit between him and *Elliot*, one of the defendants, *Kelly* was a witness, and swore he had no interest in the suit.

The question raised was, whether *Kelly* gave notice of his claim in time, and in a proper manner.

(Kelly v. Abers and others.)

The court charged the jury, that unless *Kelly* gave notice of his claim, as an actual settler in his own right, and by virtue of his improvement and settlement, he could not recover. That it was not sufficient, that he claimed the land as the tenant of *Johnstone*.

The plaintiff, *Kelly*, claimed the land at the trial, as an actual settler; thus having abandoned all right to a recovery, under the survey of *Johnstone*. If *Kelly* had given notice of his claim generally, it would have been properly referred to his better title by actual settlement and improvement, and this was properly left, by the court, to the jury, who have found that his notice was of a title claimed by virtue of *Johnstone's* survey, and the lease he held was *Johnstone's*. He cannot now be permitted to say, that he was mistaken in his title; that he does not claim under *Johnstone*, but by virtue of his improvement and settlement. If this were permitted, it would enable *Kelly* to defraud *Abers*, who, no doubt, investigated *Johnstone's* claim, and found it worth nothing; and then made improvements on the land, which would be enjoyed by *Kelly*, by whose mistake or misrepresentation he was induced to expend his money and labour. If it were designed, on the part of *Kelly*, then there can be no pretence that he would have a right to recover. The laws will permit no man to be benefited by his fraud. If it was a mistake of his right, the maxim will apply, that when one of two innocent persons must suffer, he, who is the cause of the loss, must bear it.

Motion for a new trial overruled, and judgment affirmed.

[PITTSBURG, SEPTEMBER 11, 1827.]

CIST and others *against* ZEIGLER.

IN ERROR.

A former verdict and judgment for the plaintiff in replevin, on the issue of no rent in arrear, is a bar to an action for use and occupation, for the same rent for which distress was made, if it appear by the pleadings, that a certain rent was reserved, and that the distress was for the same rent now claimed, whether the former judgment be pleaded as an estoppel, or given in evidence on the general issue.

ERROR to the Court of Common Pleas of *Butler* county.

Case, by *Abraham Zeigler* against *Charles Cist*, *Daniel Beltzhover* and *Thomas Cromwell*, in which the plaintiff filed the following statement:

The plaintiff states the cause of action to be, for the use and occupation by the defendants, of certain real property of the plaintiff, situated in the town of *Harmony*, in the said county, which property of, and belonging to the plaintiff, was, and is known by

(Cist and others, v. Zeigler.)

the name and appellation of *the school property*, in said town, and which property was used and occupied by the defendants, with the consent and permission of the plaintiff, from the first day of *April*, 1818, until the first day of *April*, 1821, being a term of five years.

The defendants pleaded *non assumpserunt*, and payment with leave to give the special matters in evidence; replication, *non solverunt* and issues.

On the trial, the defendants gave in evidence the records of two actions of replevin, in the Court of Common Pleas of *Butler* county, *Thomas Cromwell*, *Daniel Beltzhofer*, and *Charles Cist*, against *Abraham Zeigler*, and *John Branston*; No. 13, to *April* Term, 1820, and No. 33, of the same term, in which actions of replevin *Abraham Zeigler* avowed for rent in arrear, and *John Branston* made cognizance, as bailiff; and the plaintiff replied, no rent in arrear, and in No. 13, a verdict was given, that the property be returned to the plaintiff, and six cents damages, and six cents costs; and in No. 33, judgment was confessed by the defendants, that the property be returned, and they to pay the costs; and the defendants insisted, that, inasmuch as the defendant in the actions of replevin had avowed for rent in arrear, and the replication of no rent in arrear having been put into the avowry, and a verdict and judgment rendered in these suits in favour of the said *Thomas Cromwell*, *Charles Cist*, and *Daniel Beltzhofer*, the plaintiff could not support his suit against them, for the use and occupation of the premises, during the same period for which he had distrained, and which was passed upon, and decided in the actions of replevin, and that he was barred by the judgment in the actions of replevin. But the court decided, that the judgments in the actions of replevin did not bar the plaintiff from recovering in the present action, to which opinion of the court the defendants excepted.

The court charged the jury, that if the defendants had occupied the property with the assent of the plaintiff, without any amount of rent fixed, the plaintiff would be entitled to a fair compensation for the occupation of his property; and that if he had shown a parol lease to *Schnee* and transfer by him to the defendants, under which they entered and occupied, the amount of rent reserved in such lease would govern in this verdict; the plaintiff would be entitled, moreover, to interest, from a reasonable time after the rent became due.

To this charge the defendants excepted.

The following are copies of the record in the cases of replevin above referred to:

Butler county, s. s.

THOMAS CROMWELL, DANIEL BELTZHOVER, and CHARLES CIST,
ABRAHAM ZEIGLER, and JOHN BRANSTON.

COURT of Common Pleas, *April* Term, 1820.

(Cist and others v. Zeigler.)

Replevin for two cows, two piano-fortes, two settees, as per schedule annexed to writ.

27th of *April*, 1820,—rule on part of the defendants to take the depositions of witnesses to be read in evidence.

On the trial of this cause, *ex parte* to rule ten days' notice, *April* Term, 1821, the defendants avow for rent in arrear, as to *Zeigler*, and make cognizance as to *Branston*.

Plaintiffs reply no rent in arrear, issue and rule for trial, and now, to wit, on the 6th of *July*, 1821, a jury being called, came, to wit, *Matthew Thomson*, (and so forth,) who fined for the plaintiff six cents damages, and six cents costs. Judgment affirmed.

Butler county, in the Common Pleas of the said county, of *April* Term, 1820.

THOMAS CROMWELL, DANIEL BELTZHOVER, and CHARLES CIST,
ABRAHAM ZEIGLER, and JOHN BRANSTON.

Replevin for one gig, &c.

Ayres appears, &c.

April Term, 1821,—the defendants avow for rent in arrear as to *Zeigler*, and make cognizance as to *Branston*. *July*, 6th, 1821, judgment in favour of the plaintiff for costs, and that the property be returned.

The jury gave a verdict in favour of the plaintiff, for eight hundred dollars, and judgment was rendered thereon. The plaintiffs in error now assigned as errors:

1. The court erred in deciding, that the plaintiff could support his suit for use and occupation, and was not bound by the judgment in the actions of replevin.

2. The court erred in charging the jury, that the plaintiff was entitled to recover interest from a reasonable time after the rent became due.

Bredin, for the plaintiffs in error.—The evidence was given without objection, and the effect of it was before the court, just as if it was pleaded. A party may waive the want of pleading. The same matter was substantially settled in the avowry. Interest on rent is given from the time it was sued for. 5 *Serg. & Rawle*, 357. *Hill v. Miller*. 10 *Serg. & Rawle*, 203. *Williams v. Smith*. The very fact in this case was put in issue in the replevin. 4 *Yeates*, 350, *Dawson v. Tibbs*.

Fetterman, *contra*, cited—4 *Com.* 197, *Estoppel, E.*, that former recovery must be pleaded, or it is no estoppel. 2 *Johns.* 382. *Lansing v. Montgomery*. Replevin is *ex delicto*, and cannot be pleaded to an action *ex contractu*. 3 *Wils.* 240.

Ayres, same side.—The very decision in the replevin was, that the proper remedy was an action for use and occupation. He referred to *Henwood v. Cheeseman*, 3 *Serg. & Rawle*, 500. *Phillips*, 225. Where recovery is not pleaded, it goes to the jury who are not concluded by it.

(Cist and others v. Zeigler.)

Baldwin, in reply.—If the landlord had recovered in the replevin, he certainly could not in case for use and occupation:—but if there had been a parol lease, he might have recovered, and in that event he cannot now. The jury were instructed to find for him even if there was a lease, making it the rule of damages. In the actions of replevin, a lease was admitted by the pleading, and the only question was, whether the rent was unpaid.

The opinion of the court was delivered by

DUNCAN, J.—If the rules of pleading had been attended to in the replevin causes, and an avowry for a certain sum in arrear, there would have been no difficulty in the question; for then the causes of action, as the avowry is in the nature of a declaration, would have appeared on the record, and the judgment, if the recovery had been for the same premises in the replevin, if pleaded in bar, would have operated as an estoppel; and, if given in evidence in the general issue, would have been equally conclusive. I know there are recent *English* decisions, that if the former judgment is not pleaded, but given in evidence on the general issue, it is not conclusive on the general issue; yet the law appears to have been settled to the contrary by many authoritative decisions, which I am not inclined to disturb.

Whatever may be the form of action, if the original question appears to have been the same, and the same evidence will support both actions, and judgment be had on the merits, it bars all other actions for the same cause; but, from the loose, inartificial, and unsatisfactory mode of avowing generally for rent in arrear, without a specification of any thing, it may or may not be that the cause of action was the same. It will be matter of evidence what was the cause of action in the former cases—matter not to be tried solely by the record, but a mixed matter, to be tried by a jury.

The fact does not clearly appear on the bill of exceptions, whether or not the former judgments were because the landlord was not able to prove a certain rent which would be the subject of distress, or because he failed in his proof of a demise altogether. In one part of the bill, it would rather appear it was because no certain rent was reserved; but, in another part, the court says, “the landlord has shown a parol lease to *Schnee*, and transferred by him to the defendants, under which they entered and occupied;” and direct the jury, that the amount of rent in such lease, ought to govern them in the verdict. Now, if the defendants did enter and occupy under the parol lease to *Schnee* for a reserved rent, then, undoubtedly, the landlord could have distrained the defendants’ goods found on the premises, and have avowed for that reserved rent in the replevin causes, and the entry and occupation under that parol lease to *Schnee*; in which case the former judgments would operate as an estoppel if pleaded in bar, or as conclusive in evidence, on the general issue, against the plaintiff.

(Cist and others v. Zeigler.)

A judgment, in every species of action, is final for its own purpose and object, concludes the subject matter, and is a bar to further litigation; the judgment following the particular right or claim in personal actions; as, here, avowry for rent in arrear, which, being in the nature of a declaration, on the issue no rent in arrear, would be conclusive evidence in every other species of action where the rent was again demanded; the verdict would be a bar—call it estoppel or conclusive evidence, its effect would be the same.

The judgment is therefore reversed, and a new trial awarded; in which the parties will take care to have the facts precisely stated. The court do not wish to anticipate the final result, or give any opinion to foreclose the parties, further than has been made necessary to the immediate decision, and desire both parties to understand this. This cause went to trial on a statement; this statement is entirely defective; and, if objection had been taken on this ground, the judgment must have been reversed; for the plaintiff has omitted to state that which is an essential part of the statement, “the whole amount which he believes is justly due to him.” How could the court, if the defendants had made default, give judgment against them for any certain sum, which is made their duty in all cases under the statement law.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 11, 1827.]

VANKIRK *against* CLARK and GRAHAM.

APPEAL.

The commissioners of a county have power to take and hold lands for the use of the county, where bought in to secure a debt or mortgaged for that purpose.

How far they are a corporation.

A purchaser at a judicial sale of the land of *A.*, has a right to show, in ejectment for a share of the land by *B.*, who was the former owner of that share, that *B.* had for a long time left the plaintiff in possession of the whole, and had repeatedly declared, that he had sold his share to *A.*: that he had returned other land to the assessor, and not this, and made other declarations, proving that he had parted with his title to *A.*: and if *B.* alleges the purchase money due by *A.* not to be paid, he is bound to show it.

The books of the commissioners, showing the property to have been assessed as *A.*'s, are evidence, in connexion with such declarations, against *B.*

THIS case came before the court on appeal from the decision of Mr. Justice Ton, at a Circuit Court, held at *Pittsburg*, in *August*, 1827.

The writ was ejectment for one moiety of a tract of land in *Allegheny* county, brought by *John Vankirk*, against *Clark* and *Graham*, which the plaintiff claimed under a sale to him, and his brother, *William Vankirk*, by the executors of *William Samp-*

(*Vankirk v. Clark and Graham.*)

son, deceased, by articles of agreement, dated the 24th of *October*, 1811. The defendants claimed the whole tract as purchasers under *William*, alleging, that subsequently to the articles, *John* conveyed his moiety to *William*.

In 1820, *William* was appointed a collector of taxes: he became a defaulter to the amount of six thousand seven hundred dollars. The treasurer issued his warrant, under which a levy was made on the whole of this land, as the property of *William*; a *venditioni exponas* issued, and the sale was made to the commissioners of *Allegheny* county, by the sheriff, for one hundred and fifteen dollars, and they by deed, dated the 21st of *May*, 1815, sold to *Robert Graham*, one of the defendants, for six hundred and ten dollars.

To show title in *William*, the defendants gave evidence, on the trial, the repeated declarations of *John*, that he had sold his share to *William*; that *William* had possession from 1816 to 1822, when he moved *John's* family to the place, *John* having removed therefrom, with his family, to another place in 1816, where he had built a saw mill; that he returned to the assessor the land at the saw mill, but no other property: that he said the reason of his declaring that *William* held no title, was to prevent people from bidding; that he had all the title papers, and held them as security for the money due him by *William*, for the share he had sold him: and at another time, that if they would give *William* time to pay, they should not be troubled about his, (*John's*) name, being in the articles. The defendants also proved, that *John* declared he had no property to pay a debt he owed, but what the law allowed him: and that in the township duplicates, this land was assessed to *William*, and the saw mill to *John*.

All this evidence on the part of the defendants, was objected to by the plaintiff, and admitted by the court.

His Honour charged in favour of the defendants: and the jury found accordingly.

The plaintiff filed the following reasons for a new trial:

1. That the court erred in admitting in evidence the deed from the sheriff to the commissioners of *Allegheny* county, and the deed from them to *Robert Graham*, one of the defendants.

2. In admitting the evidence of the assessors of the return of land in *Elizabeth* township by the plaintiff.

3. In admitting general evidence of any conversations with the plaintiff about the land in question, without first proving some act of sufficient importance to take the case out of the statute of frauds and perjuries.

4. In admitting the assessment of the land in question, from 1816, &c.

5. In charging the jury, that it was unnecessary for the defendants to prove the terms or conditions of the parol sale of the land in question, from *John* to *William Vankirk*, or the payment of the consideration money.

(Vankirk v. Clark and Graham.)

6. That the jury ought to presume payment of the whole consideration, unless the plaintiff would show the terms of sale, and how much was due.

7. The court directed the jury to find for the defendants, and took from them the consideration of all the facts.

8. In charging, that the title of *John* was a secret equity.

Selden, for the appellants.

1. Was the interest of *John* vested in *William*? It is said to have been a parol sale. The defendant was bound to take it out of the statute of frauds by clear proof. They were *both* in possession *before* the alleged sale; there was no proof of change of possession in reference to the agreement. They were *tenants in common*. It was not proved that *John* left the land in consequence of the sale, but of his embarrassed circumstances. There was no evidence of payment of the whole purchase money, even if that were sufficient to take the case out of the statute. The burden of proof lay on the other party, who set up the sale. If from the declaration of *John*, it would be inferred there was a conveyance, it would be necessary for the defendants to produce it.

Vankirk has exhibited a legal title. Whether the defendant relies on fraud or an equity, he can defend himself only by showing himself entitled to a conveyance, and of this the proof rests on him.

The plaintiff had no notice of the sort of title against him: and it is unreasonable to call on him to explain *instantly*.

Admission to a bill filed that he has sold, and the statute pleaded: there can be no specific performance. The presumption from the admission of *John*, was not the ground on which the point was put at the trial. *Drennan* swore that *John* had retained the title papers to secure the purchase money.

It was wrong to receive evidence of a purchase by the commissioners, who cannot hold land. Their situation might be stronger than that of *William*, the brother of *John*. Commissioners are not authorized to purchase: their vendee, therefore, cannot stand in a better situation than a stranger accidentally in possession. They are not a corporation. They are expressly authorized to purchase in particular instances.

There was error in admitting evidence of the assessment of the land in the name of *William*. This did not tend to prove the issue. So also evidence of conversations; and in instructing the jury that the purchase money ought to be presumed paid. The court took the facts from the jury; whereas, they should have stated the facts, that would take the case out of the statute.

Forward, contra, was directed to speak only to the capacity of the commissioners to purchase.

The power is absolutely necessary to the purposes of the commissioners. The point was touched, though not decided, in 6 *Serg. & Rawle*, 166. In case where a power to purchase is given

(Vankirk v. Clark and Graham.)

by statute, the act makes it a *duty*; such acts are only declaratory as to the existence of the power. If the power be salutary, why not recognize it? He cited, 8 *Johns.* 422.

Baldwin, in reply, referred to 3 *Serg. & Rawle*, 543. There must be a change of possession *in pursuance of the contract*. Evidence must be preceded by proof of contract, or an act that can be referred only to some contract. 1 *Peters*, 388.

The opinion of the court was delivered by

DUNCAN, J.—I refer to the judge's charge for a statement of the facts.

Eight reasons have been assigned by the plaintiff, why a new trial should be granted: on the argument, it appears to me, they have been reduced to three.

1. That the commissioners of *Allegheny* county had no authority to buy lands; the conveyance to them was, therefore, invalid, and they could transfer no right to *Graham*; and, if so, then it would be a controversy between *John* and *William Vankirk*, in which *John* having shown an equitable title, would be entitled to recover, unless it appeared in evidence that he had made a valid sale to *William*, and parted with his title; and if it was by parol, then it would be incumbent to show the precise agreement, what had been paid, and what remained due on it, if it did not appear all had been paid, and that this burden lay on the defendant.

2. Generally, to the charge of the court, with respect to the statute of frauds and perjuries.

3. The admission of evidence of the assessments of *John* and *William's* property, in *Elizabeth* township.

The first raises a question of nice discussion, and merits attention and consideration. It never yet has been decided, that the commissioners of a county, are a corporation. In *Snow v. The Commissioners of Washington County*, this is made a query, 1 *Serg. & Rawle*, 505, and in *Lyon v. Adams and others, Commissioners of Cumberland County*, 4 *Serg. & Rawle*, 443, the court avoid giving any opinion, whether commissioners constitute a corporation, liable to be sued; but if they should, the suit must be against the commissioners, without naming them individually, and the judgment would be entered in like manner.

The legislature have given to them a very important incident of a corporation, a common seal; and, it is certain, they have sustained an action in the name of commissioners. *The Commissioners of Philadelphia County v. Snyder*, 2 *Yeates*, 95. *Commissioners of Berks County v. Ross*, 3 *Binn.* 523. If they can support an action in their public name of office, if the court will acknowledge such a body, capable of maintaining an action, what good reason can be given for not charging them in an action? If they are *quasi* a corporation to sue, they are *quasi* a corporation to be sued. It

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would be against all principle, to say, that in a contract with them as commissioners for building a bridge, or any matter within the scope of their general authority, they could maintain an action on the instrument, and yet the person contracted with, could have no action on the same instrument. Actions of assumpsit have been maintained by the overseers of the poor of one township against the overseers of the poor of another. *North Whitehall Overseers v. South Whitehall Overseers*, 5 Serg. & Rawle, 126. To give them an action, a judgment and execution, without the means of reaping the fruits of it, would not seem to consist with the wisdom of the law; for, on execution levied, if the land would not condemn, could not the commissioners take it in extent, and lease it. That such corporations, as commissioners, empowered to issue execution, to levy and to sell, can, to secure the debt, purchase, would seem to be consistent with their general power; not that they could buy and hold lands foreign to the nature of their institution; but that they should be enabled to buy in to secure the debt; for otherwise by combination not to bid, the execution might be stopped. By law, in certain cases, they are enabled to buy land for the use of the county, as in sales for unseated lands, where the lands are not bid up by others to the amount of taxes.

The commissioners of a county are coeval with the settlement of the country—are the public agents of the county, with respect to all the money concerns; and must necessarily possess an authority without any express grant from the legislature, commensurate with their public trusts and duties. Chief Justice SPENCER, in *The Overseers of Pittstown v. Overseers of Plattsburg*, 18 Johns. 418, says, that in 8 Johns. 424, the court recognized the authority of the supervisors of a county, an office, somewhat resembling county commissioners, before the act authorizing them to take grants of lands for county purposes, to take such grants for county purposes; and it was there said, that there are many instances of collective bodies of men coming under one general description, endowed with a corporate capacity in some particulars expressed, but who have in no other respect the capacities incident to a corporation.

The commissioners have no power to take lands for any other purpose than for the use of the county they represent; and I think, cannot take lands, except in the case of lands bought in by them to secure the county debts, on process from the courts, or their own process authorized by law, or mortgages given to secure the county debts. Thus far, they have the necessary authority. It is an authority necessary to the discharge of their public trusts and duties; and which I believe, has been pretty generally exercised. No possible evil can result from it, and the public interest requires in some instances its exercise. I am, therefore, of opinion

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that the sale to the commissioners was a good one, and the conveyance vested the title in them for the use of the county, and they had a right to transfer it.

The sale was in the nature of a judicial sale on execution, in which the commissioners were purchasers. It was a sale of the whole tract, where there had been a notorious and exclusive possession and enjoyment by *William* of the whole for years; *John* having removed to another place, and having on all occasions declared that he had sold his share to *William*. It is not a question between *John* and *William*, a pure question under the statute of frauds and perjuries, on a parol sale, in which it would be incumbent on *William* to prove the agreement, the possession delivered on that agreement and its explicit terms; but a purchase at public sale, where the purchaser could not prove what the agreement was, or its terms, or that all was paid, or if any due, what it was. The uniform declaration of *John* from 1815 down to the time of the levy, was that he sold to *William*. The sale was accompanied with the possession; the possession necessarily in pursuance of the sale. Questions of evidence are always to be understood with relation to the subject matter, and the parties; they are accommodated to the exigencies of the case. Their foundation is natural justice, general convenience and common sense. The burden of proof generally lies on the party who makes the allegation, because it is supposed to be with his knowledge; it forms a part of his title, as if the dispute here was between *John* and *William*. But the defendant stands in a different situation: he is a purchaser, a stranger no wise concerned in the particular agreement of the brothers; he knows that *William* has been long in the exclusive possession, he knows that *John* had left it, left it with a declaration that he had sold his share to *William*. Now, the words sale of my share, signify an absolute sale with payment; or, if it is ambiguous, *John* should explain it—should show what the sale was: the purchaser at public sale has a right to this explanation. Is it a secret between *John* and *William*—for there is no evidence what it was—how could the purchaser show what it was?—what clue had he to unravel it? At no time, in no conversation, did *John* speaking of this sale, allege that there was any thing due on it. To cast the burden of proof on the purchaser, would be imposing on him what he never could do, what is not within his power or knowledge. To leave it on *John*, is leaving it on the man who ought to bear it. If there is any thing due on it, he can show what it is. It was, therefore, fairly left to the jury to presume, that, as *John*, who could show if any thing was due, what it was, declined to do it, all was paid. The whole conduct of *John*, and the nature of the transaction, is persuasive evidence, that having sold his share, having left the sole possession to his brother, making no demand for years, offering to become security for his brother; declaring when the report was made against him, by arbitrators in the case of *Mat-*

(Vankirk v. Clark and Graham.)

thereby, that he could not collect it; he had no more property than the law allowed; his declaration, "That *William* and he had bought together, but if they will give *William* time, the commissioners shall never be troubled with this article," show that he had no claim against *William*, at least was *prima facie* evidence sufficient to call on him to rebut it. The judge, therefore, most properly said, that if *John Vankirk* now alleges, after what he has said and done since 1816, that the purchase money is yet due, he ought to show the amount.

As to the admission of the assessments of *John* and *William's* property, this was a spark of evidence, at least, to strengthen the other circumstances, to show that this was all *William's* property. Where *John* had property in the township, it was assessed in his own name, while this was assessed in the name of *William*.

The assessment in *William's* name could not divest *John* of his right. It was a circumstance unimportant, standing alone. Yet, connected with the declarations and conduct of *John* for many years, it was of some consideration, as showing the notorious and acknowledged possession of the brothers, and *John* can have no reason to complain, if he by his own declarations and conduct, has put his title in mystery, is called upon merely to explain that which is so much within his power to clear up—to show the time of the sale to his brother, and what shall remain due to him, which would be an equitable lien on the land, and which he could recover through the medium of an ejectment.

Appeal is therefore dismissed, and judgment affirmed.

[PITTSBURG, SEPTEMBER 11, 1827.]

PURVIANCE *against* LEMMON.

IN ERROR.

L., by articles of agreement, sold a lot of ground to P., and took single bills for the purchase money, all of which were satisfied except two. The lot was afterwards sold as the property of P., on a judgment against him, obtained after the sale by B., and was purchased at sheriff's sale by H., who sold to L. L., afterwards sued P., on the two single bills. *Held*, that he was not entitled to recover.

In the Court of Common Pleas of *Butler* county, two suits were brought to *January* Term, 1821, by *Robert Lemmon*, the plaintiff below, and defendant in error, against *William Purviance*, in debt, to recover the amount of two single bills given by the defendant to the plaintiff; one for one hundred dollars, and the other for fifty dollars. These two actions were consolidated by

(Purviance v. Lemmon.)

the agreement of the parties, and the following case was stated for the opinion of the court, in the nature of a special verdict.

The defendant, on the 10th of *August*, 1814, purchased of the plaintiff, by an article of bargain and sale, lot No. 9, in the borough of *Butler*: at the same time, the defendant gave to the plaintiff his notes for the purchase money of the said lot, which were all paid or judgments obtained upon them, excepting the two notes, which these suits were instituted to recover. A judgment was obtained in the said court, at *November Term*, 1815, *Isaac Bean v. Purviance*, for one hundred and fifty-seven dollars and thirty-three cents; a *fieri facias* issued thereon to *February Term*, 1816, a levy was made on the said lot, inquisition held, and condemnation. A *venditioni exponas* issued to *August Term*, 1818, by virtue of which the lot was sold on the second of *September*, 1818, to *James Hill*, for one hundred dollars, and a deed was executed to him by the sheriff, and duly acknowledged. *James Hill*, the purchaser at sheriff's sale, leased the said lot to *John Dunbar*. *Robert Lemmon* the plaintiff, brought an ejectment to *July Term*, 1819, against *John Dunbar* the tenant, for the recovery of the possession, or the residue of the purchase money of the said lot. On the 25th of *April*, 1820, this entry was made on the record of the ejectment; "settled and judgment for costs." On the 2d of *October*, 1820, *James Hill*, in consideration of one hundred dollars, conveyed all his title in the said lot to *Robert Lemmon*, the plaintiff. The agreement between *Lemmon* and *Hill*, as to the purchase of *Hill's* title, was made before the entry of judgment in ejectment, but was not reduced to writing.

In the court below, a verdict and judgment were rendered in favour of the plaintiff.

Bredin and *Baldwin*, for the plaintiff in error.—*Lemmon* became again the owner of the legal and equitable title; he had got the property back again. The land became debtor. *Hill* purchased *Purviance's* interest, which was only to the amount of purchase money paid. *Lemmon* cannot recover the whole purchase money, without conveying to some one; but here he would have the purchase money, and the legal title too, together with a beneficial interest to the value of one hundred and fifty dollars for nothing. The settling of the ejectment against *Hill*, was satisfaction of the purchase money. He had chosen his remedy, and was bound to adhere to it. They cited 9. *Serg. & Rawle*, 397, 5 *Serg. & Rawle*, 223.

Fetterman and *Ayres*, *contra*.—It will not be pretended that if *Lemmon* had not bought from *Hill*, the circumstance of *Purviance's* interest having been sold, would discharge him from the pay of these single bills. Then what operation can the purchase have? By that purchase, he has only acquired all the interest that *Purviance* had; which will certainly not weaken the case. The sheriff's sale did not dissolve the original contract, and if that still

(Purviance v. Lemmon.)

exists, why shall it not be executed. *Lemmon* cannot be debtor and creditor both.

The opinion of the court (ROGERS, J. dissenting) was delivered by

GIBSON, C. J.—The plaintiff below entered into articles for the sale of a lot to the defendant, and took obligations for the purchase money. Several of these being paid, a judgment creditor sells the defendant's interest at sheriff's sale, to a person who in turn sells it to the plaintiff, the original vendor; and this suit being brought for the residue of the purchase money, it is said the re-acquirement of the equitable interest by the vendor, does not work a dissolution of the contract. At law it certainly does not; but the action for purchase money being open to equitable objections, the inquiry will be whether it is not otherwise in equity.

It has been determined that where the title has not been conveyed, a judgment against the vendee is a lien only to the extent of the purchase money actually paid, the estate of the vendee being an equity which arises from payment, and the vendor, consequently, being a trustee only *pro tanto*. What did the purchaser at the sheriff's sale acquire here? Exactly the equity which the preceding purchaser had paid for, and which, on paying up the residue, would have authorized him to call for a specific execution of the contract by the vendor, or any one who should have succeeded to his rights and his responsibilities. But the contract remained in force between the original parties, and the vendee also, on tendering the residue of the purchase money, would have been entitled to a conveyance; or the vendor having tendered the conveyance, would have been entitled to sue him for the purchase money. But, suppose the contract to be executed between these two, (and the vendee would have been entitled to have it executed, had he done then, what he is called upon to do now,) the consequence is, that being invested with the legal estate, he would have been in a condition to enforce the terms of the original contract against the purchaser at the sheriff's sale, who would have been compelled to reimburse him the residue of the purchase money which he had paid, or surrender the possession. Thus would have stood the matter between the purchaser at the sheriff's sale and the original vendee, who would have been in the relation of *cestui que trust*, and trustee. But the original vendor has stepped into the place of the purchaser at the sheriff's sale; and let us for the sake of the argument, suppose him to have done this after the original vendee had stepped into *his* place, by having paid the purchase money, and received a conveyance of the legal estate. The consequence would be, a right in the vendee to compel the original vendor to reimburse him the sum paid as the residue of the purchase money, just as he might have compelled the purchaser at the sheriff's sale, under whom the original vendor now holds; and this not by action of debt on the contract, but by action of ejectment on the le-

(Purviance v. Lemmon.)

gal title. But, what would be the consequence of reimbursement thus enforced? The parties would have changed places, and the original vendor having in his newly acquired character of vendee, paid off the residue of the purchase money, would have been entitled to a reconveyance. Thus we see that a complete execution of the contract all round, would leave the parties exactly where they already stand; the vendor having the estate, and the vendee the purchase money.

This result is not to be varied by the circumstance of the vendor having re-acquired the interest of the purchaser at the sheriff's sale, *before* the original vendee had entitled himself to a conveyance. The equity sold by the sheriff, is reunited to the legal estate, in the original vendor; and as to it, the contract is executed, or to speak more properly, extinguished by operation of law. How stands it in regard to the other portion of the equitable estate, which has all along remained in the vendor? If the contract exists for any purpose, it must exist for every purpose; and as well for the purpose of being executed by the vendor, as by the vendee. Now, let the vendor have purchased back the portion of the estate that was out of him, when he may, he acquired no more than what he paid for; and in the character of a vendor, he can maintain an action on the contract, only by showing that he has executed a conveyance or done what is equivalent. He could not retain the estate, and recover the purchase money. But having executed a conveyance, and received the purchase money, the parties would still stand in the relation of vendor and vendee, having as in the former instance changed places, and being liable, the one to reconvey the title, and the other to restore the purchase money. Now, an action which should produce this consequence would be an absurdity. To avoid this, the contract is to be considered as extinguished by a sort of equitable remitter, because to execute it circuitously would, as I have said, bring the parties and the estate to the point from which they started, and produce a result already obtained—a union of the legal and equitable estates, in the person of the original vendor, and a restoration of the purchase money. The re-acquiring of a portion of the equitable estate; under circumstances like the present, may therefore be set up against an action on the contract for the same reason, that a covenant not to sue, may be pleaded as a release. In either case it would be idle to sustain an action, the legal consequence of which would be a right in the defendant to have again whatever should be recovered from him.

Judgment reversed, and judgment for the defendant below.

[PITTSBURG, SEPTEMBER 19, 1827.]

DEARTH and another *against* LAUGHLIN, Bail of
LAUGHLIN.

IN ERROR.

By an appeal from the judgment of a justice, the plaintiff does not forfeit the costs accrued before the appeal, though he recovers no more than he did before the justice.

ERROR to the Court of Common Pleas of *Fayette* county.

This was a *scire facias* sued out by the plaintiffs in error, *Randolph Dearth* and *James Davis*, against *David Laughlin*, bail of *Adam Laughlin*, upon a recognizance before a justice of the peace.

The following case, to be considered as a special verdict, was stated for the opinion of the court:—

Adam Laughlin recovered before a justice of the peace against the plaintiffs in error, who were the defendants in that suit, the sum of twenty-six dollars. From that judgment he appealed, and *David Laughlin* became his bail, and entered into the recognizance upon which this suit is founded, in the sum of fifty dollars, conditioned that the said *Adam* prosecute his appeal with effect; and, that if the judgment of the justice be affirmed, or if the said plaintiffs, in that action, should recover less than the judgment of the justice, the plaintiffs in that suit should pay all costs which *had* or *might* accrue, with four dollars as a counsel fee, and fifty cents per day, for every day the appellee should attend on such appeal; or that he, the said *David Laughlin*, the defendant in error, would on or before the first day of the next term, after the judgment, surrender the said *Adam* to the jail of the county, &c. *Adam* recovered in court the same sum of twenty-six dollars, which was recovered by him before the justice. The defendant in this action did not surrender the said *Adam*, &c., according to the condition of the recognizance, nor hath the said *Adam* paid the costs which had accrued *before the appeal*. The plaintiffs in this action, who were the defendants in that, gave other evidence in court than they gave before the justice, as did also the plaintiff in that action, the said *Adam Laughlin*.

Upon this, the court below rendered judgment for the defendant.

Ewing, for the plaintiffs in error.

Dawson, *contra*.

PER CURIAM.—By appealing, the plaintiff did no act which could have the effect of forfeiting his right to the costs accrued before the justice, which were vested by the judgment. The costs

(Dearth and another v. Laughlin, Bail of Laughlin.)

of the appeal depend on other considerations; but these were not claimed, and we cannot perceive any colour for the allegation of error.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 11, 1827.]

LODGE and others *against* BERRIER.

IN ERROR.

The minute of the prothonotary of the acknowledgment of a deed by the sheriff, is not evidence to prove the deed, if the non-production of it is in no way accounted for.

ERROR to the Court of Common Pleas of *Mercer* county.

Ejectment brought by *George Lodge* and others, heirs of *Benjamin Lodge*, deceased, the plaintiffs below and plaintiffs in error, for two hundred and fifty acres of land in *Salem* township.

The plaintiffs gave in evidence, on the trial, *William Barker's* application for four hundred acres and patent, dated the 25th of *March*, 1820, to *John Walker* and *John Hummel* for the same:—record of the Court of Common Pleas of *Mercer* county, *John G. Fry* and others, administrators of *J. M. Fry*, deceased, against *John Walker*, surviving partner of *Brobst* and *Lodge*, to *February* 7th, 1817, and judgment for five thousand dollars:—record of the Supreme Court of *Pennsylvania* in same cause, showing that the said judgment was reversed on the 26th of *September*, 1821:—record of the Court of Common Pleas of *Mercer* county, *Same v. Same*. *Venditioni exponas* to *May* Term, 1818, returned two hundred and fifty acres sold to *Jacob Fry* for fifty dollars.

The plaintiffs then offered in evidence as follows:—record of the Court of Common Pleas of *Mercer* county, showing an entry by the prothonotary, dated the 24th of *November*, 1818, that the sheriff had acknowledged a deed to *Jacob Fry* for the said two hundred and fifty acres. The defendant objected. *By the court*.—The plaintiffs do not offer to follow this with the sheriff's deed, nor to show its loss, nor any attempt to procure it. This entry by the prothonotary is secondary evidence, and is therefore rejected. To which opinion of the court the plaintiffs' counsel excepted.

The plaintiffs further offer to give in evidence as follows:—*February*, 1823, warrant of restitution issued by the Court of Common Pleas of *Mercer* county, in pursuance of the decree of the Supreme Court in the aforesaid suit of *Fry* and others, executors of *Fry*, deceased, v. *John Walker* and others, to which the de-

(Lodge and others v. Berrier.)

defendant objected: whereupon the plaintiffs offered to follow the said testimony, by showing a writ of restitution, No. 43, *August Term, 1823*—*W. Scott and J. Christy*, executors of *John Walker*, deceased, surviving partner of *J. Brobst and B. Lodge*, v. *John George Fry and John Michael Fry*, administrators of *John Michael Fry*, deceased, upon which the land for which this ejectment was brought, is levied on and condemned. Also, a *venditioni exponas* in same case, No. 39, *November, 1823*, showing the sale of the same land to *Joseph Lyons*, who purchased in trust for the heirs of *Benjamin Lodge*, and a deed from *A. Dunn*, esq., sheriff to *Joseph Lyons* for the said land; and to follow it by testimony, that this land that appears by the record, (the rejected record,) to have been purchased by *Jacob Fry*, was paid for to the sheriff by the administrators of *John Michael Fry*, deceased. To which evidence the defendant objected. The court rejected the evidence, and by request of the plaintiffs' counsel sealed a second bill of exceptions.

On this record, the counsel of the plaintiffs in error assigned the following errors:—

1st. The court below erred, in not permitting the record of the Court of Common Pleas of *Mercer* county, showing an entry by the prothonotary, that the sheriff had acknowledged a deed to *Jacob Fry* for the two hundred and fifty acres, the land in dispute, to be read in evidence to the jury.

2d. The court below erred, in not permitting the warrant of restitution, No. 43, *August Term, 1823*, to be read in evidence to the jury, and in rejecting the evidence offered.

Bredin and S. Foster, for the plaintiffs in error.

1st Error.—In rejecting the entry on record, of the acknowledgment of the sheriff's deed. The record is as good evidence as the original: it is not secondary evidence. In *Krider's Lessee v. Nargong*, 1 *Dall.* 268, a sheriff's deed, acknowledged in court, was held admissible in evidence. By *M'KEAN*, C. J., the registering in the office of the prothonotary is a sufficient recording within the act. *Per YEATES*, J., a deed registered in court, (a sheriff's deed,) is equal to recording. They also cited, *M'Cormick v. Mason*, 1 *Serg. & Rawle*, 92. When once the deed is acknowledged by the sheriff, the title passes to the purchaser. The entry of the deed on the record of the Court of Common Pleas, is equal to recording in the office of the recorder of deeds.

2d Error.—In rejecting the evidence of the warrant of restitution. This writ was a record, and ought to have been received, accompanied with the other evidence offered by us.

Banks, for the defendant in error.

1st Error.—The evidence of the entry of the sheriff's acknowledgment was not evidence at common law, or by the act of assembly. In the cases cited, the deed itself was produced. The entry on the record is but an *abstract*, not a *copy* of the deed.

(Lodge and others v. Berrier.)

2d Error.—It was necessary to prove some title in *Fry's* executors. Some title must be shown in the person, as whose property the land is sold, before the sheriff's deed to him can be given in evidence. *Kennedy v. Bogart*, 7 *Serg. & Rawle*, 98. *Hoge v. Long*, 10 *Serg. & Rawle*, 10. The plaintiffs neither proved title, nor offered to prove title, in the administrators of *Fry*.

Reply.—The evidence of the entry of the sheriff's deed was rejected, solely on the ground of being *secondary* evidence. There is no act of assembly permitting a sheriff's deed, *acknowledged in court*, to be recorded in the recorder's office. In the case of *Krider's Lessee v. Nargong*, 1 *Dall*, 268, M'KEAN, C. J., said, that the registering of the deed in the office of the prothonotary, is a *sufficient recording within the act*.

The opinion of the court was delivered by

ROGERS, J.—This is an action of ejectment, brought to recover two hundred and fifty acres of land, purchased for the use of the plaintiffs at a sheriff's sale. In the trial of the cause, it became necessary to prove *some title* in the person, as whose property the land was sold, according to the authority of the case of *Kennedy v. Bogart*, 7 *Serg. & Rawle*, 98. For this purpose, the plaintiffs offered in evidence, the record of the Court of Common Pleas of Mercer county, showing an entry by the prothonotary, dated the 24th of November, 1818, that the sheriff had acknowledged a deed to *Jacob Fry*, for two hundred and fifty acres of land, the property in dispute, without any offer to show the deed of the sheriff, its loss, or any attempt to procure the deed.

An acknowledgment by the sheriff in open court, and a minute of this on the record, with the production of the deed itself, is a sufficient recording of the deed. 1 *Serg. & Rawle*, 96. The minute on the record is a mere abstract of the deed, and not a copy, and the non-production of the original, without some account of its loss, or some pains taken to procure it, is a circumstance of suspicion. It does not necessarily follow, that, because it has been acknowledged, and a minute made of it, that the deed has been delivered to the purchaser. It does sometimes happen, that he will not, or cannot comply with the terms of sale; in which case, it is retained or placed in the hands of a stranger as an escrow, until the money be paid. Whether that was the case here, does not appear. The deed was neither produced, nor was its non-production accounted for; and without this, the minute on the record is but secondary evidence, which ought not to be received.

The errors assigned are so blended, that the decision of the one necessarily disposes of the other. Without showing an interest in the executors of *Fry*, as whose property the land in dispute was sold, (which can only be done by showing the deed to *Fry*,) this suit cannot be sustained.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 11, 1827.]

KEITE, Administrator of KENNEDY, *against* BOYD.

IN ERROR.

Replevin does not abate by the death of the defendant, while the suit is pending.

A WRIT of *replevin* was issued out of the Court of Common Pleas of *Somerset* county, the 8th of *April*, 1822, to *May* Term of that year, by *James Boyd*, the defendant in error, against *John Kennedy* for a gray mare. *Kennedy*, the defendant below, gave bail to the sheriff, and retained the possession of the mare. In 1823, pending this action, *Kennedy* died. At *December* Term, 1823, the death of the defendant below was suggested, and *John Keite*, surviving administrator of the deceased, was substituted by consent, and pleaded "*non cepit*" and "property," upon which issue was joined. On the 4th of *December*, 1824, a trial was had by a jury, and a verdict for one hundred dollars, in favour of the plaintiff below. On the same day a motion was made in arrest of judgment, which was held under advisement until the 5th of *February*, 1825, when, on motion, judgment "*de retorno habendo*," was entered.

The plaintiff in error assigned for error,

1. The court below erred in entering judgment against the plaintiff in error, the administrator of *Kennedy*, inasmuch as the action died with *Kennedy*, he being the defendant therein.

2. If the plaintiff below was entitled to a judgment in his favour on the verdict of the jury, it ought to have been a judgment, "*quod recuperet de bonis, &c.*" and not "*de retorno habendo*," and therefore there is error in the judgment entered by the Court of Common Pleas.

Kennedy, for the plaintiff in error.—The question is, whether the action of replevin abates by the death of the defendant, I contend it does.

Replevin lies for goods unlawfully detained, though the taking has been lawful. 15 *Mass.* 359. 17 *Mass.* 610. The action of replevin survives the death of the plaintiff, but not of the defendant. 3 *Mass.* 321. Replevin abates by the death of the defendant. *Miller v. Baldwin*, 4 *Mass.* 480. Action against the sheriff for escape, if one of them dies, the suit does not abate. *Cro. Eliz.* 265. Trover lies not against executors for conversion by his testator. *Hambly v. Trott*, *Cowp.* 372. 5 *Serg. & Rawle*, 272. 6

Forward, for the defendant in error.—The reason why trover does not survive, is that the plea is *non cepit*. In replevin, property is in question. If replevin does not lie, no action lies.

(Keite, Administrator of Kennedy, v. Boyd.)

Kennedy, in reply.—I do not admit that no other action lies. If the goods came to the hand of the administrator, replevin would *lie against him*. If the intestate converted them into money, an action against his administrator for money had, &c. lies. This court decided, that an action for breach of promise of marriage abates by the death of the defendant. This court will not confound the forms of action.

The opinion of the court was delivered by

ROGERS, J.—At common law, all personal actions died with the party. The inconvenience and injustice of this rule, as respects the death of parties' plaintiffs has been remedied, in cases of trespass *de bonis asportatis*, trover, and replevin. The rule seems to have been founded on the reason that as the assets of the deceased are not benefited, his estate shall not be liable, and from a desire, I suppose, to have an end to an action frequently arising from the passions of the parties. In those cases where the reason applies, the rule is founded on the soundest principles of public policy; as in the case of slander, libel, and the like. It does not apply where the matter in dispute involves a right of property. Where one man receives the property of another, his fortune ought to answer it, for that swells the assets in the hands of his personal representatives. In contravention of this rule, it has however been decided that trover abates by the death of the defendant. 6 *Serg. & Rawle*, 272. Without venturing to deny the authority of that case, I may be permitted to regret that such is the law of *Pennsylvania*; and am unwilling to extend the cases further than we are bound to do by the principle of state decisions. Replevin in this state is an action to try the right of property. It issues wherever a man claims goods in the possession of another, without any regard to the manner in which the possession was obtained. 1 *Dall.* 157. 6 *Binn.* 3. 3 *Serg. & Rawle*, 562. In practice, it is a suit much resorted to, having many advantages over any other form of action. You either repossess yourself of your property, or obtain security to the amount of its value. To expose the plaintiff to the risk of losing his remedy, by the death of the defendant, would be to curtail, nay, in some cases to destroy his chance of justice; for unless the property remains in specie, in the hands of the executor, you would be deprived of all remedy, contrary to every principle of justice, and every rule of public policy. As we are not fettered by any decided case, and the action has been so essentially changed, the court are of opinion, that the suit does not abate by the death of the defendant in replevin.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 16, 1827.]

ORMSBY and another *against* FORTUNE.

IN ERROR.

Pending a suit for a debt by A. against B., A. agreed to receive from B. C's. note, to be in payment in case it should be paid at maturity. It was not paid, and A. proceeded in his suit and obtained judgment against B. B. afterwards sued A., alleging that the amount of the note was lost by A's. not giving up to him the note, nor using due diligence in prosecuting C. *Held*, that A. was not bound to take any trouble or risk in recovering the money or delivering up the note to B.

Query, Whether A. would be liable if he had refused to deliver the note to B. on request, whereby B. sustained a loss.

WRIT of error to the special Court of Common Pleas of *Allegheny* county, which was argued by *M'Donald*, for the plaintiffs in error, and *Burke*, for the defendant in error.

The opinion of the court was delivered by

TON, J.—To understand this case, a former suit between the same parties must be mentioned. *Walter Fortune*, the plaintiff below, owed a debt on a promissory note to *Ormsby* and *Doane*, the defendants below and plaintiffs in error, upon which suit had been brought. At the same time, one *Byer* owed a debt to *Walter Fortune*, and it was arranged between the three parties, that *Byer* should give to *Ormsby* and *Doane*, his (*Byer's*) promissory note, payable at sixty days: which was done under this agreement, that the note of *Byer* was to be in payment of the note of *Fortune* to *Ormsby* and *Doane*, in case it should be paid at maturity. *Byer* never paid this note. Demand was duly made, and a protest for non-payment. No suit was brought against *Byer*; but *Ormsby* and *Doane* proceeded with their suit against *Fortune*, and in two or three years obtained a verdict and judgment against him. There was no proof of notice by *Ormsby* and *Doane*, to *Fortune*, of *Byer's* neglect to pay, nor of his insolvency,—nor have they ever given up, or offered to give up the note itself to *Fortune*. For that neglect of notice, and for not using diligence to procure payment from *Byer*, this special action upon the case is brought by *Fortune*, alleging as a grievance the loss to him of the debt due from *Byer*. On the trial, he offered proof for the purpose of showing that *Byer* was able to pay. On the other side, proof was offered for the purpose of showing *Byer* to have been at the time insolvent. It was also contended, on the same side, that the law did not require any notice in the case.

The evidence given on the trial is brought up with the record, and is not material in any other view, than as it is connected with the charge of the court. Judging only from the record, the case

(Ormsby and another v. Fortune.)

would appear to be strong to establish the fact of *Byer's* insolvency: except that *Byer* himself, whose deposition was taken, proved that he offered to *Ormsby* and *Doane*, to pay them the note in merchandize, and that he made another offer to *Fortune* to pay in the same way, provided his note was given back to him. His ability to pay was denied by other witnesses. To the same purport, sundry judgments against him, previous to the note and since, and yet unpaid, were produced from the records.

The court left the facts fully to the jury. They said that if *Byer* was insolvent, the defendants were not bound to hazard the costs of a law suit against him. In this, it is apprehended, they were clearly right. An error is alleged in the court's omission to charge the jury relative to the conclusive effect of the former verdict and judgment, against *W. Fortune*, in the suit on the first note, between the same parties about the same matter. This omission of the court is not error. Their attention was not called to that point. It does not appear to have been mentioned on the trial. But in some other parts of the charge there does appear to me to be error. In it the court gave a pretty strong opinion to the jury, that *Ormsby* and *Doane* were bound to use diligence to recover the money from *Byer*; that, in order to relieve them from the imputation of laches, the proof of *Byer's* insolvency ought to be very clear; and they charged the jury, in point of law, that even if *Byer* was insolvent, yet *Ormsby* and *Doane* ought to have given notice to *Fortune* in a reasonable time, and to have returned the note. It must be kept in mind, that the express agreement was for *Ormsby* and *Doane* to take *Byer's* note, *to be credited if paid when due*. They did not assume upon themselves, nor, in my opinion, did the law impose upon them, any trouble or risk. They demanded the money at the day which, perhaps, they were not required to do. As to restoring the note to *Fortune*, as contended for by the counsel, it had never been in *Fortune's* hands, nor was ever payable to him, nor was he upon it as indorser. Whatever might be its value to *Ormsby* and *Doane*, the note was a thing which they were not bound to part with; at any rate they were not bound to seek out the plaintiff, *Fortune*, in order to give it up. If *Fortune* wanted notice of *Byer's* insolvency, or on any subsequent event wanted the note in his own hands, he should have provided so in the agreement. Even if notice, in a case like this, were required; yet the parties all lived in the same place, and there appears to be strong proof that *Fortune* had actual notice, not only of the non-payment, but of the insolvency; for *Byer*, his own witness, swears that he offered to *Fortune* himself to pay the note in merchandize, provided the note was given up to him. I agree that it might have been a material advantage to *Fortune* to have an opportunity of saving the debt, or part of it, in this way; and, if he had made this offer of *Byer* known to *Ormsby* and *Doane*, and requested that the note, apparently useless to them, might be

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given up to him in order that he might get something for it, and they had refused without good reason, if *Fortune* had done and proved all this, what would have been the legal or equitable effect of such proof cannot now be decided; but certainly a case would have been made out very different from the present. For full authority to support the decision which the court is to give, I name the case of *Leas and another v. James*, 10 *Serg. & Rawle*, 307. The unanimous opinion of the court, is to reverse the judgment, and award a *venire de novo*.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 17, 1827.]

COMMONWEALTH against The SHERIFF and GAOLER
of Allegheny County.

HABEAS CORPUS.

A prisoner, who stands indicted for aiding and abetting another to commit murder, and has not been tried at the second term, is not entitled to his discharge on *habeas corpus*, if the principal has absconded, and proceedings to outlawry against the principal were commenced without delay, but there had not been time to finish them.

Habeas corpus to produce the body of *Martin Rennie*.

It appeared that the prisoner, *Rennie*, had been, since the 14th of *April* last, confined in jail, charged first by the coroner's inquest, and afterwards by indictment found at the last *April* Term of the Court of Oyer and Terminer, with feloniously aiding, assisting, and abetting a certain *Daniel Hicks* to kill and murder a certain *Levi Smith*. At the same term, *Hicks* the principal, was indicted for the same alleged murder; but he absconded, and had not been taken. *Rennie*, the prisoner, demanded a trial at the *April* Term. He also demanded a trial or a discharge at the *August* Term following. The prosecutor for the commonwealth refused to go on to a trial, alleging that the trial asked for in name, was a mere acquittal in fact; for the principal, *Hicks*, not being forthcoming, nor convicted by trial, or by outlawry, the proof indispensable by the rules of law could not be given against the prisoner, *Rennie*. At the same time the prosecutor offered to proceed to the trial if he, *Rennie*, the prisoner, would consent to be tried without the previous conviction of the principal, *Hicks*. This consent the prisoner refused to give. Process of outlawry was begun without delay, but there had not yet been time enough, according to the act of assembly, to complete it. After argument by *Fetterman* and *Baldwin* for the prisoner, and by *R. Wilkins* for the commonwealth, the opinion of the majority of the court was delivered by

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TOD, J.—The prisoner's counsel rely on the third section of the *habeas corpus* act (*Purd. Dig.* 342.) "If any person shall be committed for treason or felony, and shall not be indicted, and tried some time in the next term, session of oyer and terminer, general gaol delivery, or other court where the offence is properly cognizable, after such commitment, it shall and may be lawful for the judges or justices thereof, and they are hereby required upon the last day of the term, sessions, or court, to set at liberty the said prisoner upon bail, unless it shall appear to them upon oath or affirmation, that the witnesses for the commonwealth, mentioning their names, could not then be produced; and if such prisoner shall not be indicted and tried, the second term, sessions, or court, after his or her commitment, unless the delay happen on the application, or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment."

It appears to me, that in order to put a right construction upon this section we must take into view the whole act as applicable to the present case. The intent of the law is evident: it is declared in the preamble. Here is no complaint of wilful delay, nor of any delay at all, except the delay occasioned by the express legislative enactment. The trial might go on, upon the facts and merits, with the consent of the prisoner waiving the conviction of his principal, but not otherwise, and to swear a jury in the case, without such consent and without such conviction, would be a trial but in name only. The principal, having absconded, cannot be attainted except by process of outlawry. To complete that process requires, by the act of 1791, three terms, and more of the Supreme Court. It seems to me, therefore, that this prisoner is not by law entitled to be discharged at the second term after his commitment, for want of an outlawry which requires a much larger space of time to effect.

Substantially, the question here, may in my opinion, be reduced to this: whether by the *habeas corpus* act of 1785, a person charged as accessory before the fact to the crime of murder shall be dismissed without a trial, in all cases wherever he who is charged as the principal felon, shall escape from justice; or, in other words, whether it is optional with such accessory to be tried on the indictment, or not to be tried, according to his own pleasure. The preamble of the act expressly confines itself to "*all wrongful restraints of personal liberty.*" The words of the third section, *unless the delay happen with the assent of the defendant*, seem clearly to import the sense of the legislature to be, that the trial thus delayed should have been practicable, and that they were not speaking of a trial impossible by the rules of law. What then, was the third section of the act, intended to provide against? I think it was intended to provide against the abuse of a protracted trial, to provide not only against the malice of a prosecutor, but against his negligence, against all *his* delays whether with cause

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or without cause, against every possible act, or want of action, of the prosecutor; but not to shield a prisoner in any case from the consequences of any delay made necessary by the law itself. The construction of the act contended for by the prisoner's counsel, would probably, if adopted, go far to unnerve the whole criminal law. Usually, our Courts of Oyer and Terminer must be held but for a limited period, and that period frequently a short one, and the president, who must usually compose a part of that court, is often required by law to hold another Court of Oyer and Terminer in another county the next week. If then several prisoners are to be tried, or one prisoner upon several charges, and if by one lingering trial the legislature have put it in the power of a defendant to smother a legal inquiry into his guilt, under the name of preventing wrongful imprisonment, who does not see the consequences? Again, if it should happen that the trial of a prisoner should be prevented by his temporary insanity or extreme sickness, as it ought to be, and must be, this delay might not, and in the first case could not, happen with the assent or on the application of the defendant, and would come within the full benefit of the argument here; and, according to that argument, such defendant would have a right by law to be set at liberty without a trial.

If, on this occasion, or any other, ground should be laid to believe that process of outlawry, or any thing of the kind, had been got up, and abused for the purpose of maliciously keeping a prisoner in jail, he would be entitled to a discharge.

My opinion does not depend on the offer of the prosecutor to try the cause, and the refusal of the prisoner to waive the conviction of the principal. Most clearly, he might so refuse without in the least abandoning any other legal right.

We do not oppose the doctrine of the case, read by the prisoner's counsel, *Respublica v. Arnold et al.* 3 Yeates, 263. In principle that case supports the present decision.

As the prisoner offers no bail for his appearance upon the indictment, the opinion of the majority of the court is, that he be remanded.

GIBSON, C. J., dissented.

Prisoner remanded.

[PITTSBURG, SEPTEMBER 18, 1827.]

HOLDSHIP *against* JAUDON.

IN ERROR.

If one in custody on a *ca. sa.* give a bond to the plaintiff, conditioned for his surrender on or before a certain day, such bond is good.

If the condition of a bond be to do a thing against a maxim or rule of law, and not *malum in se*, the bond is single.

ERROR to the Court of Common Pleas of *Allegheny* county, in a suit brought by *William L. Jaudon*, the defendant in error and plaintiff below, against *Henry Holdship* and *Jonathan H. Lambdin*, the plaintiffs in error.

Lambdin being in custody of the Marshal of the *United States* for the western district of *Pennsylvania*, by virtue of a *capias ad satisfaciendum* issued at the plaintiff's suit, on the 13th of *October*, 1823, gave a bond to the plaintiff, on which this action was brought, in which *Holdship* joined as surety, conditioned that *Lambdin* should surrender himself to prison, on or before the 3d of *November* following, whereupon the marshal discharged him from custody. He was not afterwards surrendered. On the 16th of *November*, 1823, he was put in jail on a *ca. sa.*, at the suit of *William Brown* and sons, and remained there till he was discharged under the act of congress; no mention being made of the *ca. sa.* at the suit of the plaintiff. *Lambdin* died before the trial.

The suit was debt on the bond. The pleas *nil debet*, with leave, &c., and performancee.

The defendant, *Holdship*, gave evidence, to which the plaintiff demurred; and the court below gave judgment for the plaintiff.

Forward, for the plaintiff in error.—The only question is whether the consideration of this bond is legal. We say it is not. *Yelv.* 197. *Com. Contr.* 30. *Strong v. Tompkins*, 8 *Johns.* 98. It was a breach of duty in the sheriff to take this bond. Here the taking the bond was the act of the sheriff. It was void originally: no ratification by the plaintiff can set it up. The consideration of the bond was an escape.

Fetterman, contra, cited *Leach v. Davis*, *Alley*, 58. 2 *Mod.* 304. *Hall v. Carter*, 7 *Mass.* 98. *Clap's Administrator v. Coffrand*, *Ib.* 200. *Burrows v. Louder*, 8 *Mass.* 373. But, if the condition were unlawful at the time of making the bond, it is single. *Co. Lit.* 206, b.

Forward, in reply.—The court will not follow the distinctions of Lord COKE at this day. The penalty formerly became the debt; now, chancery looks to the real nature of the contract. In *Mit-*

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chell v. Smith, 4 *Dall.* 269, a single bill was held void, because the contract contravened the laws of the state.

The opinion of the court was delivered by

ROGERS, J.—If we confine ourselves to the points raised by the pleadings, we can have but little difficulty in deciding this cause. The defendant gives evidence to support the pleas of *nil debet* and performance; to which evidence the plaintiff demurs. On this demurrer to the evidence of the defendant, the court are required to examine the validity of the bond on which suit is brought. This cannot be done, for the only matter submitted to the court, is, whether the evidence sustains the defendant's pleas, and, as it is conceded that it does not, there would, (if we should stop here,) be an end of the question. Waiving, however, all matters of form, which seems to be the wish of the plaintiff and defendant, we will consider the point *intended* to be raised on this record. Is the bond declared on such an instrument as will sustain the plaintiff's action? I do not consider this a bond for ease and favour. Bonds of that description are void; but they are given, not to the creditor, but to the sheriff, to obtain from him a favour and indulgence, to which the debtor is not legally entitled. 7 *Mass. R.* 101. *Alleyn R.* 58. 2 *Mod.* 304. 7 *Mass. R.* 98. 8 *Mass. R.* 373. 11 *Johns. R.* 27. The plaintiff himself may enter into a composition with his debtor. There is no rule of policy which prevents it; and such agreements are frequently for the advantage of debtor and creditor. This was an agreement in the name of the plaintiff, with the assent of his attorney, and since ratified by the plaintiff himself.

The defendant, *Lambdin*, was in the custody of the marshal when the bond was signed, with the condition that *Lambdin* should surrender himself to prison on the *ca. sa.*, on or before the 3d of *November*. It is said that the surety could not surrender his principal, nor could he surrender himself, so as to be entitled to a discharge under the acts of congress, for the relief of insolvent debtors; that the jailer could not receive and hold him, without rendering himself liable to an action. However this may be, it merely goes to show that the condition of the bond is contrary to a maxim or rule in law. In 2 *Co. Lit.* 27, *title, Estates upon Condition*, the rule is distinctly laid down which I conceive governs this case.

It is commonly holden, that if the condition of a bond, &c., be against law, that the bond itself is void.

But herein the law distinguisheth between a condition against law, (that concerneth not any thing that is *malum in se*,) but, therefore is against law, because it is repugnant to the estate, or against some maxim or rule in law.

If a condition of an obligation be, to do a thing which is *ma-*

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lum in se, the condition, and also the obligation is void; as, if an obligation be with condition to kill another. *Co. Lit.* 266, b. 3 *Com. Dig.* 98.

But if the condition of an obligation, &c., be only to do a thing contrary to a maxim of law, or repugnant to the nature of the grant or estate, the obligation is good. 3 *Com. Dig.* 98.

In the first case the obligation is void; in the last, which is the cause before the court, it is single.

Judgment affirmed.

[PITTSBURG, SEPTEMBER, 1827.]

PARR and another *against* BOUZER.

IN ERROR.

Testator devised certain land to his son *B.*, charged with the payment of his debts. *B.* took possession, and it was afterwards sold to *L.* at sheriff's sale, on judgments against *B.* for his own debts.

Prior to this sale, a judgment was obtained against the executors of the testator, for a debt due by him, and by virtue of an execution, subsequent to said sale, other land of the testator devised to other children, was sold to *L.* who obtained possession.

Held, that *L.* bought the land devised to *B.*, subject to the payment of the testator's debts; and that the other children, devisees, were entitled to recover back from *L.* the tract devised to them.

In the Court of Common Pleas of *Westmoreland* county, the plaintiffs in error, who were plaintiffs below, brought this action of ejectment for land in *Derry* township, against *John Bouzer*, the defendant in error, and the defendant below; and the following case was stated for the opinion of the court, to be considered in the nature of a special verdict.

Samuel Parr, the father of the plaintiffs, died in the year 1812, seised in fee simple of the premises, having first made his last will and testament, dated the 1st of *September*, 1812, by which he devised and bequeathed, as follows: "As to such worldly goods as it has pleased God to bless me with, I will and dispose of in the following manner: *First*, I will and bequeath to my beloved wife *Sarah*, forty dollars *per annum*, during her natural life, to be paid in the manner directed below. *Secondly*, I will and bequeath to my son *Benjamin*, the house and lot wherein he now lives, together with a point piece of ground behind, and adjoining the same; also, one moiety or undivided half part of a tract of land in *Derry* township, lying and adjoining the *Loyalhanning* creek, commonly called the "*Point Place*," to him, his heirs, and assigns for ever: *Thirdly*, I will and bequeath to my son *William*, the house and lot wherein I now live, together with the lot I got from *Joshua Beatty*, to him, his heirs, and assigns for ever: but it

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is not to be sold by him without first obtaining the consent of my executors hereinafter named, or either of them, who may longest survive: *Fourthly*, I will and bequeath to my daughter *Elizabeth*, twenty dollars, to be paid as directed below. Also to her son *Samuel Parr*, my grandson, two hundred dollars, to be paid for his use when he shall arrive at ten years of age, at the discretion of my executors, hereinafter named: *Fifthly*, I will and bequeath to my daughters *Polly* and *Deborah*, one moiety or undivided half part of the tract of land described above, commonly called the "*Point Place*," share and share alike, to them and their heirs and assigns for ever. And, it is further my will and pleasure, that all my estate, real, personal, and mixed, not already bequeathed, be sold by my executors, immediately after my decease, and they are hereby authorized to convey a good and sufficient title to that part of my real estate which may remain after my decease, to be sold by them, and the proceeds thereof shall be applied at the discretion of my executors, to pay my funeral and other necessary expenses. The residue, if any, to be applied to the payment of the legacies bequeathed as above to my daughter *Elizabeth* and her son, and my grandson, *Samuel Parr*: that in case the sums mentioned immediately above should prove insufficient to discharge the legacies bequeathed to my daughter *Elizabeth* and her son, *Samuel Parr*, then, and in such case, my two sons, *Benjamin* and *William*, and my two daughters, *Polly* and *Deborah*, shall each of them refund so much out of the estate bequeathed to them respectively, as in the opinions of my executors shall appear reasonable and just for discharging the above mentioned legacies; and it is further my will and pleasure, that my son *Benjamin* pay annually to my wife *Sarah*, twenty-two dollars out of the estate bequeathed to him; also that my son *William* pay annually to my wife *Sarah* ten dollars out of the estate bequeathed to him; also, that my daughters *Polly* and *Deborah*, pay annually to my wife *Sarah* eight dollars out of the estate bequeathed to them; and these three several payments shall continue during the natural life of my wife *Sarah*, and these said sums respectively shall be a lien on the lands and tenements bequeathed to my sons *Benjamin* and *William*, and my daughters *Polly* and *Deborah*, during the natural life of my wife *Sarah*. And it is further my will and pleasure, that my son *Benjamin*, after my decease, pay all my just debts out of the property bequeathed to him, except what are already provided for above. And in case he neglect or refuse so to do, my executors are hereby authorized to compel the same. And whereas, I hold on my son *Benjamin*, several obligations which my executors are hereby authorized to cancel and make void upon condition of his paying the debts of the estate as mentioned above. And further it is my will and pleasure, that my executors immediately after my decease collect all debts due me, if any, and settle the estate at as early a period as possible. And I do nominate, con-

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stitute and appoint, *Isaac Parr*, sen., of *Derry* township and *William Moor*, and *John Kirkpatrick*, of *Salem* township, my whole and only executors of this my last will and testament. In testimony, &c.

The said *Samuel Parr* also died, seised in fee simple of all the other lands, houses, and lots in the said will mentioned. *Mary Parr* and *Deborah Parr*, the plaintiffs, are daughters of the said *Samuel Parr*, and the same persons to whom he devised one moiety, or half part of the plantation or tract of land in *Derry* township, the same land for which this ejectment is brought.

Benjamin Parr, one of the sons and devisees of *Samuel Parr*, immediately after the decease of *Samuel*, and probate of his will, entered into the possession of the lands, houses, and lots, devised to him by the said will, by virtue of the devise, and under the will, and continued the possession thereof, until the same were sold as hereinafter stated by the sheriff. The executors of *Samuel* settled their administration account, and it was passed on the 23d of *August*, 1819, in which a balance was due the said executors of five dollars and three cents. The debts due by *Benjamin* to *Samuel* in his lifetime, and which are mentioned in the said will, were not contained in the said account, and were never paid, nor any part thereof, by *Benjamin* to the executors, nor demanded by them, but the obligations for the payment thereof were cancelled by the executors. The interest of *Benjamin* in the tract of land in *Derry* township, devised to him by the will of *Samuel*, was sold by the sheriff of *Westmoreland* county, in pursuance of executions, numbers 63 and 64, to *February* Term, 1819, on judgments against the said *Benjamin Parr*, in *November*, 1817, and *February*, 1818, and purchased by *James Lemon* at the sheriff's sale for seven hundred and fifty-five dollars, and a deed made and duly acknowledged for the same by the said sheriff to the same *James Lemon*, on the ——— day of ———, in the same year. The said house and lot in *New Alexandria*, and land thereunto adjoining, devised to *Benjamin*, by the said will of the said *Samuel*, was sold by the said sheriff in pursuance of execution, number 62, *February* Term, 1819, to the said *James Lemon*, for eight hundred and sixty-five dollars, upon a judgment against the said *Benjamin Parr*, number 153, *November* 1817, for which a deed was made to the said *James Lemon*, by the said sheriff, and duly acknowledged on the ——— day of ———, 1819. In pursuance of the said sale by the said sheriff, and purchase by the said *James Lemon*, the said *James Lemon* entered into and took possession forthwith according to law of the said lands, lots, and buildings, with the appurtenances, having paid the whole purchase money to the said sheriff before receiving the deed or taking possession. *Benjamin W. Parr*, mentioned in the said judgments and executions, is the same person mentioned as *Benjamin Parr* in the said will of *Samuel Parr*, and in this statement. The sur-

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plus monies arising from the said sales beyond the debt, interest, and costs in the said execution, were appropriated and paid by the sheriff to other judgments against the said *Benjamin W. Parr* in *Westmoreland* county. *Joseph Shoemaker* and *John Townsend*, executors of *John Townsend*, deceased, commenced a suit against *Isaac Parr*, and *John Kirkpatrick*, executors of the said *Samuel Parr*, deceased, number 59, *May*, 1817, and obtained judgment thereon on the 18th of *August*, 1817, which was liquidated on the 19th of *November*, 1819, and issued a *fieri facias*, number 16, *February*, 1820, by virtue of which the tract of land in *Derry* township, mentioned in said will was levied on and by virtue of a *pluries venditioni exponas*, number 94, *February*, 1822, was sold to *James Lemon*, by the sheriff of the said county, and duly conveyed for the price of two hundred and eighty dollars and one cent, and the deed duly acknowledged, and the purchase money paid to the said sheriff, on the ——— day of ———, in the same year.

The plaintiffs by their guardians, they being minors, forthwith after the decease of the said *Samuel Parr*, took possession of the premises mentioned in the said ejectment, and continued the same until the said purchase by the said *James Lemon*, under the said last mentioned execution, number 94, *February Term*, 1822, after which, and before the bringing of this suit, *James Lemon*, without their consent, entered into possession thereof, and put the defendant in possession thereof under him as his tenant. The said defendant is admitted to be in possession of the premises in the said declaration mentioned at this time, and when the said ejectment was brought.

The President of the court below filed of record the following opinion:

“The land which the plaintiffs claim was devised to them by their father, *Samuel Parr*, and afterwards sold by the sheriff on a judgment for debts contracted by him in his lifetime. The will contains the following clause: “It is further my will and pleasure, that my son *Benjamin*, (to whom by a former claim one half of the tract had been devised by his father,) after my decease pay all my just debts out of the property bequeathed to him, except what are already provided for above, and in case he neglect or refuse so to do, my executors are hereby authorized to compel the same. And, whereas, I hold on my son *Benjamin* several obligations which my executors are hereby authorized to cancel and make void upon condition of his paying the debts of the estate as mentioned above.” It is admitted that those debts of the testator were not paid by *Benjamin*, nor demanded of him, and that his obligations were cancelled by the executors. What the amount of those obligations was, or whether it or any part of it could have been recovered from him does not appear. But, independent of these obligations, it does not appear that the whole of the assets which came into the executors’ hands have been duly administered, and a ba-

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lance found due to them on the settlement of their account. The whole of the real estate of which the testator died seised, whether devised or not, was subject to the payment of his just debts. But it is contended, that the purchaser at the sheriff's sale took the premises in question, subject to the payment of those very debts, and thus, that the interest of the plaintiffs under the devise ought not to be affected by the sheriff's sale. I have not been able to discover the least analogy between the cases cited in support of this idea, and the present case. The one half of the land was sold on judgments against the testator in his lifetime. The whole of it was then liable to be sold on those judgments, if insufficient to pay those liens within seven years. It may have been irregular to sell only one half, and if application had been made in due time, the levy and sale might have been set aside. It may be presumed that the object was to save, if possible, the other half devised to the plaintiffs, with the hope of raising funds either from *Benjamin*, or by other means, to discharge the debts which he ought to have paid. But this object having failed, and a judgment having been rendered, in an action of covenant, against the executors of *Benjamin Parr*, and there being no assets in their hands to discharge it, the sale of the other half became, in a manner, inevitable. It might have been, perhaps, avoided by the plaintiffs paying it *pro interesse suo*. It may be regretted, indeed, that by the comparative smallness of the price for the half of the land last sold, or by some neglect on the part of the executors, they have suffered an injury. But, be the case as it may in that respect, the purchaser is entitled to be considered as a fair purchaser, and whether he had notice or not of the contents of the will, his title under the sheriff's deeds cannot be affected by any lien, (which, by the bye, I consider to be only supposititious,) created by it.

Foster, for the plaintiffs in error.—The purchaser of *Benjamin's* estate took it as it was in his hands, subject to the appropriation to the payment of these debts; not having done so, the debts are as against him to be taken as discharged.

Coulter, contra.

The opinion of the court was delivered by

DUNCAN, J.—On the case stated in the nature of a special verdict on the will of *Samuel Parr*, the court are of opinion that the plaintiffs were entitled to judgment.

The land devised to *Benjamin* was, in express terms, charged with the payment of the testator's debts. "It is my will and pleasure, that my son *Benjamin*, after my decease, pay all my just debts." *Benjamin* took it with this burden; the purchaser at sheriff's sale took it subject to this charge. If there had been a Court of Chancery here, the creditors would have obtained a decree for a sale of the estate devised to *Benjamin*, and only on a deficiency could any other property be resorted to. As between

(Parr and another v. Bouzer.)

the devisees and legatees, the residuary estate real and personal is exempt from the payment of debts, and specifically appropriated to the payment of the funeral expenses and legacies. The purchaser at sheriff's sale had notice of the debt, for judgment had been obtained: it was in its nature a schedule, and he took the estate subject to it. Having here bought at sheriff's sale, the estate discharged by the testator, shall he hold it in satisfaction of that which he was bound to pay? I think not. Every principle of justice, every rule of equity, forbids this. He stands now in the shoes of *Benjamin*; he is the owner of both estates. Say, if you please, the legal title has vested in him; equity would decree that he should hold in trust. He is now able to do what in equity he ought to have done—what equity would have decreed him to have done, and his purchase at sheriff's sale shall enure to that very purpose. He was bound to pay the debts, at least the land in his hands: he has paid them, by the purchase of the property: he shall not be permitted, in a Court of Equity, to hold the property so as to exclude the other devisees from the right acquired under the will from which all deduce title, by a purchase for debts which his estate ought to have discharged. He shall not be permitted to say, "True it is, I bought my lands subject to the payment of this debt. I ought to have paid it, but I did not; because, by suffering the lands of *Mary* and *Deborah* to be sold, which I ought not to have done, I can make the estate pay my debts. I could buy it in, and discharge my own, which was properly chargeable. I can hold your lands, to discharge a debt which my own ought to have paid." Equity always supposes that to have been done which a man ought to have done, and to be done at the time he ought to have done it; and, where he is in a situation to do that which he ought to have done, it shall be supposed that he put himself in a situation for the purpose of doing it: as, here, that he bought for the use of those who ought to hold the lands discharged of those debts, for the purpose that they should so hold them.

Lemon represents *Benjamin*: *Benjamin* took the estate subject to the payment of these debts. *Lemon* took it so subject, for he had notice: the judgment against *Samuel's* executors, when it was sold, was notice to him. Shall he, by suffering the lands of the plaintiffs to be sold for that to which his own land was subject, and purchasing it in himself, by this manœuvre, I call it by no harsher name, cast the burden off his own shoulders and put it on theirs, make the land pay his debt, strip the plaintiffs of their patrimony, by omitting to do that which it was his duty to have done, and thus ease himself of the burden? Equity, in that case, will say he *shall* be considered as having done this for the benefit of the estate, to carry into effect the will of the testator, and will convert him into a trustee.

Judgment reversed, and judgment to be entered for the plaintiffs in error.

[PITTSBURGH, SEPTEMBER 18, 1827.]

KERNS *against* SOXMAN and another.

IN ERROR.

A devisee, who attested the will as a witness, is a good witness to prove the will, if before the trial thereof on a feigned issue, such devisee and her husband transfer their interest, and receive a release to the husband of all actions, from the transferee.

FEIGNED issue in the name of *John Kerns* as plaintiff, and *M. Soxman* and *C. Soxman* defendants, from the Register's Court of *Westmoreland* county, transmitted to the Court of Common Pleas for trial, where a case was stated for the opinion of the Court of Common Pleas, to be considered in nature of a special verdict.

It was admitted, that the writing produced, purporting to be the last will and testament of *Christian Soxman*, deceased, was in the handwriting of *John Barnet*, Esq., deceased, and that the name *John Barnet*, written as a subscribing witness to the same, was the proper handwriting of the said *John Barnet*, deceased; and that he subscribed the same as a witness, in due form of law. That *Sophia Soxman*, now *Sophia Kiser*, a devisee named in said writing, subscribed the same instrument of writing as a witness. That afterwards, and before the statement of this case, the said *Sophia* and *John Kiser*, her husband, executed and acknowledged a transfer of all their right under the said devise, to the aforesaid *John Kerns*, which transfer was duly recorded: and that the said *John Kerns* afterwards, and before the statement of this case, executed to said *John Kiser*, a release of all actions, &c. If, upon this statement of facts the court should be of opinion, that *Sophia Soxman*, now *Sophia Kiser*, is a witness legally competent to be examined, to prove the execution of the said writing as the will of the said *Christian Soxman*, deceased, in the said court on a trial of the said feigned issue, after the said transfer and release, and that she was a legal witness to the said execution, and subscribed the said instrument as a legal witness, then it is agreed that the said instrument of writing, is the last will and testament of the said *Christian Soxman*, deceased, and judgment is to be entered for the plaintiff. But if the court should be of opinion, that the said *Sophia Soxman*, is not a witness legally competent to be examined to prove the execution of the said will, by the said *Christian Soxman*, deceased, although she was a witness to the said execution, and subscribed the same as a witness; then, it is agreed that the said writing, is not the last will and testament of the said *Christian Soxman*, deceased. and that judgment be entered for the defendants.

(Kerns v. Soxman and another.)

Judgment for the defendants by the court below.

Barclay and *Foster*, for the plaintiff, cited the following cases: *Vin. Ab. Title Evidence*, P. 14. No. 53. *Wyndham v. Chetwynd*, 1 Burr. 423. *Hilliard v. Jennings*, 1 Lord Raym. 505. *Dickson v. Bates*, 2 Bay, 448. This case is precisely in point. *Powell on Devises*, p. 60, 70, 100. *Austin v. Bradley*, 2 Day's Rep. 466. *Williams v. Peters*, 12 Serg. & Rawle, 177.

For the defendants were cited. *Phil. Ev.* 375, 376. *Hilliard v. Jennings*, 1 Raym. 507. *S. C. Carthew*, 515. *Comyn's Rep.* 91. *Wyndham v. Chetwynd*, Burr. 424. *Starkie on Evi.* 1689. *Anstey v. Downing*, 2 Stra. 1235, (1253). *Amory v. Fellowes*, 5 Mass. 228. *Sears v. Dillingham*, 12 Mass. 360. *Cornwell v. Isham*, 1 Day, 35.

The opinion of the court was delivered by

GIBSON, C. J.—Decisions on the *English* statute reflect no light on our act of assembly. By the statute, wills are to be signed by the devisor, and attested and subscribed in his presence by three or four *credible* witnesses; without which they are to be utterly void. Hence, a question which was long agitated in the *English* courts, and finally settled by an act of parliament, whether the witnesses must be credible at the time of attesting. It was, however, not a question of competency, but of form; the doubt being not whether the witness were qualified to speak, but, whether he had been qualified to act a part in the ceremony about which he was called to speak, attesting by witnesses credible at the time, being thought by some as necessary to a will, as sealing and delivery are to a deed. It was argued, that if the word *credible* were to go for any thing, the design of the act, would not be answered by the attestation of a person who, at the time spoken of, was in contemplation of law, destitute of all legal credibility whatever. But, it must be obvious from the general looseness of the phraseology, that the word found its way into the statute, without being intended to have a definite meaning or legal operation; and that if it were in fact designed to express a necessary attribute of any of the actors in the ceremony, it was too indefinite to render it capable of judicial cognisance. It was evidently thrown in along with the "three or four" witnesses, by way of sage counsel and advice; and we feel surprise, in finding the knot deemed worthy of the legislative sword. But, however this may be, it is sufficient for the purpose, that no such question is presented by our act of assembly; which requires neither signing nor attestation, nor any other act as an integral part of the ceremony of execution, but provides only for the mode of proof, which is to be, "by two or more credible witnesses, upon their solemn affirmation, or by other legal proof." Here indeed, we find the legislature using the same word, but in a way which demonstrates that they did not contemplate the existence of credibility at the time of attesting; for those

(Kerns v. Soxman and another.)

who are called to make the necessary proof, may not have attested, nor been witnesses at all at the time of executing the paper. As to every thing but the number of the witnesses, the proof is to be according to the common law; and absurd consequences would follow were it otherwise. An accidental observer having released, would be competent, although he would have been otherwise, if at the request of the testator he had subscribed his name: or, if an interest at the date of the transaction were sufficient to disqualify *per se*, one who should release would be incompetent to prove the testator's handwriting, although perhaps ignorant of his interest till the moment of renouncing it, and although it be impossible to understand how an interest of which the party is unconscious, can create a bias. Such a conclusion should be adopted only on compulsion from positive and unambiguous terms which, however, are not to be found in the act of assembly.

Judgment reversed, and judgment on the case stated rendered for the plaintiff in error.

[PITTSBURG, SEPTEMBER 18, 1827.]

The COMMONWEALTH, at the Relation of the Inspectors of the Philadelphia Prison, *against* The Commissioners of Allegheny County.

A *mandamus* will not be granted against the commissioners of the county to pay an account which is disputed, until the amount due is ascertained by an action against them in their corporate capacity.

IN obedience to a rule to show cause why a *mandamus* should not issue to compel the respondents to pay an account for keeping certain convicts in the penitentiary at *Philadelphia*, they showed for cause that the charges were unreasonable, and that the account was disputed.

PER CURIAM.—The extraordinary powers of this court, are to be put in requisition, only where a remedy is not to be had in the usual course of the law. The account presented to the respondents, although duly authenticated, is not conclusive; and a jury alone is competent to determine the propriety of the charges. The remedy, in the first instance, is by action against the respondents in their corporate capacity; after which a *mandamus* to enforce the judgment, might be altogether proper: but, before the merits are determined in the usual way, an application like the present is premature.

Blair, for the relators.

Burke, for the respondents.

Rule discharged.

[PITTSBURG, SEPTEMBER 18, 1827.]

WELLOCK *against* COWAN.

IN ERROR.

A writ of error does not lie on the order of the court below admitting a judgment against the plaintiff, assigned to the defendant, to be set off against the judgment obtained in the suit.

THIS was a writ of error to the Court of Common Pleas of *Allegheny* county; by the return to which it appeared, that the plaintiff had obtained a judgment against the defendant, who was permitted to set off against it a judgment obtained against the plaintiff and two others, by a person who assigned to the defendant a part of it, sufficient to extinguish the plaintiff's judgment. This was done subsequently to the plaintiff's judgment, and no doubt for the purpose of rendering it inoperative. On the ground of the order of set-off not being the subject of a writ of error, a motion to quash was now argued, by *Roberts*, against the motion, who cited 2 *Dall.* 215. *Add. Rep.* 120. 12 *Johns.* 31. 3 *Com. Dig.* 176.

Baldwin and *Fetterman*, *contra*, being stopped by the court,

PER CURIAM.—Set-off had no existence at the common law; relief being had only in equity. Since the statute, this branch of chancery jurisdiction has not been exercised where relief might be had at law; although, for a particular equity not provided for, chancery will go beyond the statute, and allow of what is called an equitable set-off, by virtue of its original powers. Courts of common law have long exercised the same powers in setting judgments against each other: a matter not provided for in the statute, and therefore constituting perhaps the only equitable jurisdiction which those courts possess. With us equity is administered in the form of law; and, undoubtedly, judgments are frequently reversed for error in the application of legal principles to facts before a jury. But there the error is made apparent on the record, by a bill of exceptions. Here the error is assigned in a summary proceeding not according to the course of the common law; which alone is decisive of the question. In such a case it would be inconvenient, if not impracticable, to judge of the regularity of proceedings which involve the exercise of a legal discretion, guided by facts and circumstances, of which the court in the last resort cannot be judicially apprized; or which, if affidavits were resorted to, it would be incompetent to try. In the exercise of this discretion, a party may, doubtless, suffer injury, without having the means of redress; but so he may in deciding the infinite variety of motions that may be made in the progress of a cause, in regard to which the judges are guided altogether by legal discretion, and

(Wellock v. Cowan.)

which, therefore, cannot be made the subject of redress by writ of error. Human institutions are necessarily imperfect; and the inability of courts of error to do complete justice in cases of this sort, would, if the writ lay, render our judicial system less perfect than it now is: so that the inconvenience, if any, is one that must of necessity be borne. For these reasons, we are of opinion that the writ, in this instance, issued improvidently.

Writ of error quashed.

[PITTSBURG, SEPTEMBER 18, 1827.]

MARSH *against* The COMMONWEALTH.

IN ERROR.

In a criminal case, the writ of error quashed because the *allocatur* was obtained, and the writ issued, before sentence passed.

THE plaintiff in error, being indicted and convicted of malicious mischief in the Court of Quarter Sessions of ——— county, sued out this writ of error, and obtained a special *allocatur* before sentence was passed: for which reason *Ross* now moved to quash the writ.

PER CURIAM.—In civil cases the *allocatur* is a matter of course, and the writ may therefore issue at any time. But, in criminal cases, the writ is allowed only on cause shown; and before sentence is passed it cannot appear that the defendant may not have redress in the court below. At all events, it is time enough to permit him to arrest the course of the criminal law, when he has shown that he has suffered actual injury.

Writ quashed.

[PITTSBURG, SEPTEMBER 25, 1827.]

ROBESON and others, Administrators of BRADFORD, against
WHITESIDES.

IN ERROR.

In a *scire facias* against administrators, on a judgment against the intestate, they should, after an agreement that the merits of the original judgment be tried without regard to the form of pleading, be allowed to amend by pleading *plene administravit* and no assets.

A decision of the court below, that the plaintiff's counsel shall conclude, in addressing the jury on the trial, is not the subject of a bill of exceptions and writ of error.

A bond in one thousand dollars, conditioned that incumbrances on real estate shall be removed within nine months, is not in the nature of stipulated damages for non-performance, so that the penalty is the measure of damages in case of a breach.

THE suit below was a *scire facias* to *January* Term, 1822, issued out of the Court of Common Pleas of *Allegheny* county, in the name of *Thomas Whitesides*, as plaintiff, against *Mary Robeson*, late *Mary Bradford*, *James Patterson*, and *Peter Mowry*, administrators of *Dr. Nathaniel Bradford*, who was bound with *Lazarus Stewart*, who survived *N. Bradford*. This *scire facias* was to revive a judgment entered up in 1815, on a bond and warrant for one thousand dollars, in the name of *Thomas Whitesides*, against *Nathaniel Bradford* and *Lazarus Stewart*. After several rules and pleas, it was agreed by the parties in *May*, 1826, that the merits of the original judgment should be tried without regard to the form of pleading. When the cause was ordered for trial, the defendants moved the court for leave to enter the plea of *plene administravit* and no assets; which the court refused, and the defendants excepted.

The counsel of the defendants claimed the right of making the concluding address to the jury, but the court decided that he should first address the jury, and the plaintiff's counsel should conclude; which direction the defendants excepted to.

The original bond on which the judgment was confessed in 1815, was dated the 4th of *April*, 1815, and was in the sum of one thousand dollars, conditioned for the extinguishment of incumbrances on certain property, then sold by *Bradford* to *Whitesides*, within nine months from its date.

The court charged the jury, that the sum of one thousand dollars, mentioned in the bond to *Whitesides*, was not to be considered in the nature of a penalty, but as the stipulated damages, and that upon the failure of *Bradford* to answer or extinguish the incumbrances mentioned in the condition of the said bond, within nine months from the date thereof, the bond became absolute, and

(Robeson and others, Adms. of Bradford v. Whitesides.)

the plaintiff was thereupon entitled to recover the whole amount, as damages agreed upon and stipulated between the parties. That the incumbrances not having been paid or extinguished at the time, their extinguishment by *Nathaniel Bradford*, or his representatives since, would not relieve the defendant from the payment of the sum mentioned in the bond, and the plaintiff was entitled to a verdict for one thousand dollars, with interest from the time the bond became absolute; to which opinion the defendant excepted.

The jury found a verdict in favour of the plaintiff for the sum of one thousand six hundred and thirty-four dollars and sixty-seven cents, on which judgment was entered.

Forward, for the plaintiff in error, urged all the points excepted to; and, to show that the one thousand dollars was a penalty, cited 7 *Johns.* 358. 4 *Mass.* 627.

Selden, *contra*, relied on *Perit v. Wallis*, 2 *Dall.* 252, as in point to show that the sum must be considered as stipulated damages: and referred to 7 *Johns.* 72. 2 *Atk.* 190. 8 *Mass.* 228. 2 *Com. Cont.* 537. 4 *Burr.* 2228.

The opinion of the court was delivered by

ROGERS, J.—A *scire facias* had been issued upon a judgment entered in the Court of Common Pleas of *Allegheny* county, to *January* Term, 1815, No. 115. Judgment having been obtained on the *scire facias*, and an execution issued, it was, on the 25th of *May*, 1826, on application, set aside, and the original judgment opened in *August*, 1826: the parties agreeing, that the merits of the original judgment be tried, without regard to the form of the pleadings. The defendant alleged that he had fully accounted; and, to put in this defence, asked leave to plead *plene administravit* and want of assets, which was refused by the court.

I cannot believe that the defendant intended by his agreement, to preclude himself from the benefit of this plea. It is a defence strictly on the merits, involving the personal liability of the administrator; and it would be most unjust, that he should be liable, if he had no funds in his hands. It was this he offered to show, which he was prevented doing, in which I conceive there was manifest error.

Whether the plaintiff or defendant had the conclusion to the jury, we shall not undertake to decide, as we are clearly of opinion, it is not assignable for error. Every court is the best judge of its own practice; and it does not become this court, on slight grounds, to interfere. Counsel consider the last word to the jury as of some consequence. Sometimes it enables them to remove, and sometimes to create false impressions on the minds of the jury; but every inconvenience of this kind, it is presumed, is attended to and prevented by the charge of an upright and able court. It is, at any rate, but *damnum absque injuria*.

(Robeson and others, Adms. of Bradford v. Whitesides.)

The court charged the jury that the sum of one thousand dollars, mentioned in the bond, was stipulated damages, and not in the nature of a penalty. A penalty is a forfeiture annexed to a contract, or agreement; either for the better enforcing a prohibition, or by way of security for the doing of some collateral act agreed upon between the contracting parties.

Stipulated damages can only be where there is a clear unequivocal agreement, which stipulates for the payment of a certain sum, as a liquidated satisfaction, fixed and agreed upon between the parties, for the doing, or not doing certain acts, particularly expressed in the agreement. The party may contract, and sometimes does, that on the non-performance of a particular act he will pay a stipulated sum, and in such cases, that sum is the measure of damages. Where the contract has been fairly entered into, not partaking of fraud or oppression, a court of chancery will not relieve, nor are juries permitted to inquire into the actual loss, but are bound by what the parties themselves have agreed upon. Where, however, there is such an agreement, to be in the nature of express damages, it would be easy to say so in express terms, and this would remove all difficulties of construction. The contract should be express, or it should be a necessary implication from the nature of the transaction itself. Where the non-performance can be compensated with money, of which a jury may judge, it is most consonant to reason, and best comports with the understanding of the parties, that the damages should be commensurate with the loss actually sustained. I am not able to understand what there is in this bond, which differs it from the ordinary case of a bond with a condition to perform some collateral act. If this bond should be construed as a case of assessed damages, there are but few cases in which we might not be called on for the same construction. The bond was intended as a security, that Dr. *Bradford* would extinguish certain incumbrances on the land. A breach of this condition of the bond, will be adequately compensated by damages equal to the injury sustained. I have examined the case of *Perit v. Wallis*, 2 *Dall.* 252, so much relied on, and find that the question whether it was a case of stipulated damages was not raised. The only point decided by the court, was that, under the circumstances, the jury had a right to give damages beyond the penalty of the bond.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 18, 1827.]

AMELONG and others *against* DORNEYER.

IN ERROR.

Devise, "I give unto my son J. D. my plantation, to have and to hold for ever, and, if my son J. D. dies without heirs, the plantation is to fall back to my son J. J. in the same manner and form as it was made over unto his brother, J. D." J. J. died unmarried, and without issue in the lifetime of his brother J. D. and the property was sold on a judgment and execution against J. D., who afterwards died without issue; *held*, that, J. D. took an estate tail, and the reversion passed to the testator's children, the purchaser taking only J. D's. share of that reversion.

WRIT of error to the Court of Common Pleas of *Westmoreland* county.

The plaintiffs in error, who were plaintiffs below, *David Amelong*, *James Hamilton*, and *Catherine* his wife, formerly *Catherine Amelong*, *George Deimer*, and *Elizabeth*, his wife, formerly *Elizabeth Amelong*, *Nicholas Louzell*, and *Mary*, his wife, formerly *Mary Amelong*, *Jacob*, *George*, and *Christopher Amelong*, brought this ejectment against *George Dorneyer*, and *George Ammon* admitted co-defendant; and a case was stated for the opinion of the court below, to be considered in nature of a special verdict. The defendants were admitted to be in possession of the premises described in the ejectment. *Christopher Amelong*, the elder, died seised in fee of the premises in the year 1805, having first made his last will and testament, which was duly proved and approved on the 14th of *December*, 1805, and by said will, devised the premises, as follows:

"As touching the worldly estate wherewith it has pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner and form; *first of all*, I will, that my debts which I have contracted, be discharged and justly paid; which is to be raised and levied out of my estate, that is to say, out of my stock, until paid, and then I give unto my son, *John Daniel*, my plantation, to have and to hold for ever; I also give unto my dearly beloved wife *Catherine Elizabeth*, all *that* personal property which will remain after my death if all my debts *are* paid, and her maintainance out of the aforesaid plantation, while she remains a widow; if so be that my wife, *Catherine Elizabeth*, marries again, then she is only to have the *third* share of all the personal property, and the remainder unto my son, *John Daniel*, aforesaid; and also I ordain, that if my wife aforesaid dies, the whole remainder of her property is to fall back to my son, *John Daniel*, and he has to give, and pay, after the death of his mother, to my other children for their share, namely, my daughter *Sophia Elizabeth*, twenty shillings; my daughter, *Maria Engles*, twenty shillings; my son *Christopher Frederick*, twenty

(Amelong and others, v. Dorneyer.)

shillings; my son *John Jacob*, twenty shillings; my daughter, *Anne Margareta*, twenty shillings; my daughter, *Catherine* twenty shillings, my daughter *Elizabeth*, twenty shillings: and I further will and ordain, that, if my son *John Daniel* dies without heirs, then the plantation is to fall back to my son *John Jacob*, in the same manner and form as it was made over unto his brother *John Daniel*, and I likewise constitute, make and ordain *George Ammon*, and my wife *Catherine Elizabeth*, the sole executors of this my last will and testament, &c.

John Daniel Amelong, named in the said will, entered into possession of the premises under the said will, and continued the said possession, until the year 1816, after the sale of the same by the sheriff of the said county, by virtue of a writ of *venditioni exponas*, No. 32, November, 1816, in pursuance of a judgment, in favour of *George Ammon*, and *John McCreary*, against the said *Daniel*; at which said sale, the premises were sold to the said *George Ammon*, as the property of the said *Daniel*, and conveyed by the sheriff accordingly. *George Ammon*, in pursuance of the said sale, took possession of the said premises, and put *George Dorneyer* in possession thereof, as his tenant. *John Daniel Amelong* died in the beginning of the year, 1821, intestate, and without issue, never having been married. *John Jacob Amelong*, mentioned in the said will, died, living the said *Daniel*, unmarried, and without issue, in the year 1808. *Christopher Amelong*, son of the aforesaid testator, died in the year 1809, after the death of the aforesaid *John Jacob Amelong*, and living the said *John Daniel*, leaving lawful issue, the said *David Amelong*, *Elizabeth*, the wife of *George Deimer*, *Catherine*, the wife of *James Humilton*, *Mary*, the wife of *Nicholas Louzell*, *Jacob Amelong*, *George Amelong*, and *Christopher Amelong*, plaintiffs in this suit, who are heirs at law, of *Christopher*, jr., their father, and of *Christopher Amelong* the elder, the said devisor.

Opinion of the court below:—

The defendant, *George Ammon*, makes title to the land in question, under a sale by the sheriff of the right of *John Daniel Amelong*. The land was devised to him by his father, by will, dated the 14th of December, 1805, to have and to hold for ever. That is clearly a fee simple. There is another clause in the will, providing, that if his son *John Daniel* die without heirs, then the plantation is to fall back to his son *John Jacob*. He died in the year 1808; the plain intention of the testator was, that if *John Jacob* should survive his brother *John Daniel*, having no legal issue, *John Jacob* was to have the land; but it was only in the event of such survivorship, he was to have any interest in the land: and as he did not survive, the estate, if I may use the expression, became absolute in his brother *John Daniel*, or a fee simple, and, as such, subject to levy and sale for the payment of his debts. There is nothing in the will, from which an estate in tail only can be im-

(Amelong and others v. Dorneyer.)

plied, or but an estate for life, when the land is given to the first devisee for ever.

Foster, for the plaintiffs in error.

1. The son took in tail. When the devise is expressly in fee, and a devise over, it may be cut down to an estate tail. 4 *Com. Estates tit. Devise*, 5. 2 *Fearne*, 179, 180, 181. 2 *Saund.* 388, note 8; where all the cases are collected.

2. A second estate tail in remainder, is vested in *John Jacob*.

3. The consequence is, that these estates being spent, the heirs at law of the testator are entitled to the reversion.

Coulter, contra.—Even where the limitation is on failure of issue, yet where there is an express devise in fee, the devise over is an executory devise. In such case, the estate becomes absolute in the first taker. Here the estate became indefeasible by the death of the devisee over. *Holmes v. Holmes*, 5 *Binn.* 252.

The opinion of the court was delivered by

DUNCAN, J.—This question arises on the will of *Christopher Amelong*, who devises, “I give unto my son, *John Daniel*, my plantation, to have and to hold for ever; and, if my son *John Daniel* dies without heirs, the plantation is to fall back to my son *John Jacob*, in the same manner and form as it was made over unto his brother, *John Daniel*.”

John Jacob died unmarried, and without issue, in the lifetime of his brother *John Daniel*, who is likewise deceased, without issue. The plaintiffs are heirs, under our intestate acts, of *Christopher Amelong*, the testator. The plantation was sold by the sheriff, as the estate of *John Daniel*. The Court of Common Pleas was of opinion, that *John Daniel* took an estate in fee by way of executory devise, subject to be divested by his death in the lifetime of his brother, *John Jacob*; and that, as that event did not happen, the estate in fee continued in him.

I am not able to find any intention expressed in the will, to confine the devise over to *John Jacob*, to the death of *John Daniel* without heirs in the lifetime of his brother *John Jacob*. It is indefinite failure of heirs, which, in this will, means heirs of the body; and, consequently, was an estate tail in *John Daniel*; for it is impossible that *John Daniel* could die without heirs, whilst any of his brothers or sisters were living. The testator, by *heirs*, could only mean *heirs of the body*. By the first words, *John Daniel* took an estate in fee, in express words, to hold to him for ever; and, where the remainder over is after dying without heirs, limited to one who is, or may be, heir to the first devisee, this has always been determined to be an estate tail.

Now, *John Jacob* would not only be heir of the first devisee, but heir of the testator himself. If the devise over had been to one who could not, by any possibility, be the heir of the first devisee, then the subsequent limitation over would not alter the pre-

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ceding positive devise in fee, and the court would not restrain the general import of the word heir. This was clearly an estate tail in *John Daniel*. I refer to 2 *Fearne's Contingent Remainders*, 350.

The reversion in the fee would be in the father, and always continue in him; the estate tail, being a particular estate, carved out of the testator's general estate. The reversionary interest was undisposed of by the will, and descended to the heirs immediately on the death of the testator, but would not come into possession until the determination of the estate tail; the interest of *John*, whatever it was, was the subject of a judgment which would bind it, and was subject to execution *and to sale*.

The judgment against *John Daniel* would bind his interest in the reversionary estate of the father, and vest in the purchaser his portion of that reversionary estate; consequently, if the plaintiffs were the only survivors of the testator's family, and his heirs at law, they would be entitled to one-half, and the other half be vested in the purchaser of *John Daniel's* interest at the sheriff's sale. Judgment would then be entered for the plaintiffs for that part of the estate which by our intestate law they would be entitled to, as the grandchildren of the testator. But, from the case stated, it does not precisely appear what that interest would be, nor, consequently, what would be the interest which the purchaser would take in right of *John Daniel*, of the reversionary interest of his father, the testator.

The judgment is reversed, and a *venire facias de novo* awarded, on account of the defect stated in the case in nature of a special verdict, as the court cannot render judgment for the plaintiffs generally for the whole, because it appears that the defendant would be entitled to *John Daniel's* purpart, and it does not appear what other heirs of the testator there are. The cause is remanded, to have these facts found; but the parties in interest may, without further trouble or expense, settle the distribution among themselves: the opinion of the court being, that the heirs of the testator had the reversionary interest by descent, among whom *John Daniel* is included, whose share became vested in the purchaser at sheriff's sale.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER, 28, 1827.]

PACKER, for the use of CROOKS, against HOOK.

IN ERROR.

If the defendant, to prove failure of the consideration of the note on which suit is brought, gives evidence that he did not receive the alleged consideration, the plaintiff may show by parol evidence, that the real consideration was different from that alleged by the defendant, and that the defendant received it.

ERROR to the Court of Common Pleas, of *Warren* county, in which the plaintiff in error was plaintiff below.

The action was assumpsit by *Russel Packer*, for the use of *N. Crooks*, against *Jacob Hook*, on a promissory note for the delivery of thirteen thousand feet of boards. Pleas, *non assumpsit*, payment, want of consideration, defalcation, set-off with leave to give special matters as evidence. Replication, *non solvit*, valuable consideration, no set-off, and issues.

On the trial, the plaintiff gave in evidence the following note, signed by the defendant:—

“*Warren, March, 10th, 1810.*

“Next fall, I promise *Russel Packer* to deliver him at my mill thirteen thousand feet of good merchantable boards. The above boards are for the balance due for a mill frame, and two sets of running gears, that I bought of the said *Packer*.

Jacob Hook.”

The plaintiff then proved the price of boards at the time and place mentioned in the note.

The defendant gave in evidence a bill of sale to him, signed by *Russel Packer*, dated *June 17th, 1820*, and a writing on the same paper, dated *March 10th, 1821*, which were as follows:

“For value received, I do hereby sell and convey unto *Jacob Hook*, a quantity of mill timber, viz: a mill frame, and two sets of running gears lying on the bank of *Benjamin Swisher's* cove, in *Conewango* township, being the same timber that was conveyed by *Benjamin Darling* to *A. B. Hartrough*, and by the said *Hartrough* to me; and I do authorize said *Hook* to take possession of the said timber. I do hereby acknowledge, that I have delivered the same to him.

Warren, June, 17th, 1820.

Russel Packer.”

“*Warren, March, 10th, 1821.*

“I do hereby agree, that if *Jacob Hook* should have any trouble in getting and keeping possession of the above frame and running gears, that I will pay all damages, pay all costs of suit, all trouble and expense that the said *Hook* may have, in getting possession and keeping the same.

Russel Packer.”

(Packer, for the use of Crooks, v. Hook.)

The defendant then proved, by the testimony of *Benjamin Darling*, that there was a whole mill frame, and sets of running gears as mentioned in the said writings.

The plaintiff offered to prove that all the timber that was meant to be sold to *Hook*, the defendant, was what was then on the ground; that defendant knew there was not a full mill frame and two sets of running gears, and that the writings, dated *June, 17th, 1820*, and *10th of March, 1821*, signed by *Russel Packer*, were obtained by fraud, and only intended as a guarantee against a supposed claim or intent of *Darling*, to seize the same; objected to by the defendant, and the court overruled the evidence; the plaintiff excepted.

The plaintiff offered to prove by parol evidence, that at the time the note was given by the defendant, he knew of the deficiency of the timber, and that it was left to his own generosity, to fix the balance that he ought to give for it, as it was, and that he accordingly gave this note for the balance he ought fairly to pay to the plaintiff. This evidence was objected to by the defendant: the objection sustained, and evidence overruled; the plaintiff excepted.

Galbraith, for the plaintiff in error.

Selden, contra.

The opinion of the court was delivered by

DUNCAN, J.—This was an action brought on a writing given by the defendant to the plaintiff, promising to deliver thirteen thousand feet of good merchantable boards; the above boards in full for the balance due for a mill frame and two sets of running gears bought from *Packer*.

The defendant gave in evidence a certain writing of *Packer*, dated the *17th of June, 1820*, and another writing, of the *10th of March, 1821*, and then proved that there were not delivered to him a whole mill frame and two sets of running gears. The plaintiff then offered to prove, by parol evidence, that all the timber intended to be sold to *Hook* was then on the ground, and that the writing was obtained by fraud, and only intended as a guarantee against a supposed intent of *Darling* to seize the same; and further offered to prove, by parol evidence, that at the time the note was given the defendant knew of the deficiency, and that it was left to himself to fix the fair balance, and that he did fix this amount as the balance he ought to pay.

Now, as the defendant had given evidence that there was not a full mill frame and two sets of running gears, and therefore the consideration in part failed, the plaintiff ought to have been permitted to show that the note was really given for the value of the timber received, and nothing more; and that on his own estimation. The defendant says, "I ought not to pay my note, because it was given for that which I did not receive." The plaintiff, to rebut that,

(Packer, for the use of Crooks, v. Hook.)

says, "I will prove that your note was only given for what you did receive." The defendant knew at the time the timber he had got: he knew it was not the full price of a mill and gears, and he gives his notes for the balance. If there was ambiguity, it was a latent one, which might be explained by parol evidence, and this inartificial instrument was not free from ambiguity. The bill of sale of the 17th of June, 1820, fixes no price for the timber; the notice does, and it was for this balance of the timber delivered, after it was delivered, and after it was proved not a full frame of a mill, &c., the parol evidence to rebut the defendant's equity, to explain that which was ambiguous—what was meant by the balance due, was offered. The evidence ought to have been received.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 28, 1827.]

BELTZHOOVER *against* DARRAGH and others.

APPEAL.

Two administrators sold land of the intestate to *B.*, under an order of the Orphans' Court, for payments of debts, &c., and took a mortgage in their names as administrators for the unpaid portion of the purchase money. *B.* afterwards sold about one third of the land to *Y.*, who made improvements. He then sold the residue of the land to *G.*, and took from him two bonds, one to the administrators for the purchase money due them, and the other to himself for a further sum, with a mortgage on the portion thus last sold to secure these bonds. *B.* afterwards assigned the bond in favour of himself to *P.* *G.* declining to pay interest to the administrator on account of the first mortgage, *B.* prevailed on one of the administrators to enter satisfaction of the mortgage to the administrators on the margin of the record, (reciting an order to that effect by the Orphans' Court, which had not been made,) and at the same time, the guardian of the minor children of the intestate acknowledged on the margin of the record the receipt of the last mortgage as sufficient security for the debt from *B.* After these transactions *P.* assigned his bond to another: the two administrators received some interest of *G.* and brought suit against him on the mortgage for other interest due. Suit was, however, afterwards brought on the first mortgage in the name of the administrators, for the use of the minor children. The court were equally divided on the question, whether the plaintiffs were entitled to recover, and the judgment of the court below in favour of the plaintiffs was affirmed.

Scire facias on mortgage brought by *John Darragh*, administrator, and *John Sumrall*, and *Elizabeth* his wife, formerly *Elizabeth Davis*, administratrix of *David Davis*, deceased, for the use of the heirs of *David Davis*, plaintiffs below, and defendants in error, against *Daniel Beltzhoover*, with notice to *George Poe*, jr., *James Young*, and *Chambers*, tenants in possession, and *George Poe*, *Alexander Johnston*, jr., and *William Hays*, trustees of *John L. Glaser*, defendants below, and plaintiffs in error.

(*Beltzhooover v. Darragh and others.*)

David Davis died intestate in the month of *August*, 1807, leaving a widow and minor children, seised in fee of a tract of land, lying about three miles from *Pittsburg*, containing about one hundred and eighty acres. The value of this property was not very considerable at the time of his decease, but during the rage for speculation which existed in *Pittsburg* from the commencement to the close of the late war, and for a few subsequent years, the real estate of the intestate appreciated to a great amount.

John Darragh, Esq., and *Elizabeth Davis*, having administered to the effects of the deceased, at *April* Term, 1813, applied to the Orphans' Court for an order to sell the real estate for the payment of debts and education of the orphan children of the deceased. The usual order was obtained from the court, and the administrators having reported at the subsequent *August* Term that they had made sale to *Daniel Beltzhooover*, for the sum of eleven thousand and eighty-nine dollars and twenty-nine cents, the court upon motion confirmed the sale, and ordered the administrators to execute a deed to the purchaser. The deed from the administrators to *Beltzhooover*, was dated the 31st of *January*, 1815, and recorded on the 13th of *September* of the same year. On the 17th of *July*, 1815, *Beltzhooover* executed a mortgage of the property to the administrators for the purpose of securing the sum of eight thousand and eighty-nine dollars and twenty-nine cents, the balance of the purchase money then unpaid. This mortgage and the deed to *Beltzhooover* were recorded on the same day. On the 17th day of *December*, 1817, *Beltzhooover* and wife conveyed one hundred and twenty-six acres of the property purchased from *Davis's* administrators to *John Glaser*, who on the same day executed his mortgage of the property conveyed by *Beltzhooover* to secure the payment of two bonds given by the said *Glaser*, one for eight thousand and eighty-nine dollars and twenty-nine cents, with interest, in favour of *J. Darragh* and *E. Davis's* administrators, &c., the other for four thousand one hundred and one dollars and fifty-four cents in favour of *Beltzhooover*. This deed and mortgage were recorded on the 13th of *April*, 1818.

At the *August* Sessions of the Orphans' Court, 1813, *William Hays* had been appointed guardian of the children of *David Davis*, then minors, under the age of fourteen. These administrators settled their accounts at the *November* Term of the Orphans' Court, held the 8th of *November*, 1813; at that time there were one thousand four hundred dollars due them which was liquidated from the cash payment of three thousand dollars made by *Beltzhooover* shortly after the purchase. The interest on the balance of the purchase money due by *Beltzhooover*, was paid punctually to the administrators up to the period of the sale to *Glaser*.

On the 23d of *December*, 1817, *Beltzhooover* conveyed to *James Young*, in consideration of four thousand seven hundred and eighty-six dollars, sixty-three acres and one rood, being a part of the land

(*Beltzhoover v. Darragh and others.*)

contained in the first mortgage, but omitted in the second: and on the 20th of *June*, 1818, he assigned for a valuable consideration to *James Poe*, jr., and his assigns, the bond of *Glaser* to him for four thousand one hundred and one dollars and fifty-four cents, mentioned in the second mortgage.

In *March*, 1819, in consequence of *Glaser's* declining to pay the interest until *Beltzhoover* released the property from the first mortgage, *Darragh* and *Hays* were induced after some negotiation to agree to discharge the first mortgage, and to accept the second in lieu thereof. They accordingly went to the recorder's office, and signed the following entries on the margin of the record of the first mortgage:

"I do hereby acknowledge to have received satisfaction in full for the debt and interest due on this mortgage, which was paid by the mortgage of *John L. Glaser*, dated the 17th of *December*, 1817, and recorded in book A. page —, in *Allegheny* county, given me for the same debt, and which I accepted in discharge thereof. This mortgage of Mr. *Glaser* is now by order of the Orphans' Court transferred to the case of *William Hays*, the guardian of the minor children of *David Davis*, deceased.

John Darragh, Adm."

"I acknowledge that the mortgage of *John L. Glaser*, above named, has been placed in my hands by *John Darragh, Esq.*, and that being guardian as aforesaid, have accepted of the same as sufficient security for the debt due thereon.

William Hays, Guardian.

Neither *Darragh* nor *Hays* knew till some time after of the assignment of the bond by *Beltzhoover* to *Poe*: nor did it appear that any such order of the Orphans' Court as that recited in *Darragh's* acknowledgment of satisfaction, existed. But they both thought the property security for two or three times the amount of the mortgage. Before, however, they would agree, they required and obtained from *Beltzhoover*, and three sureties, an indemnity under seal, by which they covenanted to save *Darragh* and *Hays*, and the heirs and representatives of *David Davis*, harmless from any loss that might happen from the entry of satisfaction, and that *Glaser's* mortgage should be a sufficient security. In *October*, 1819, *Poe* assigned his bond to Mrs. *Potts*, his mother-in-law. *Beltzhoover* made considerable improvements after his purchase from the administrators. *Young* also made improvements on the property he bought of *Beltzhoover*. There was parol evidence given of these matters, and the defendants endeavoured to show that Mrs. *Davis* knew of the arrangement, and assented, and that *Thomas Davis*, one of the children, after he came of age, received interest from *Glaser*. It appeared, that in 1821, *Glaser* was sued by the plaintiffs for the interest on his mortgage, and judgment obtained.

The president of the court below charged the jury as follows:—

If *Hays* and *Darragh* had authority to enter this satisfaction,

(*Beltzhooover v. Darragh and others.*)

but acted under a misrepresentation of facts made to them by *Beltzhooover* in relation to the security to be substituted, and you are satisfied that under the mistake produced by such misrepresentation, they made the substitution, such substitution would not be binding on the heirs of *David Davis* in an action where no other interests than those of themselves and *Beltzhooover* were involved, unless they had subsequently assented to it; but if other persons unacquainted with the facts, had become interested in the property, standing in the position of innocent purchasers, they would be protected whether there had been a subsequent assent on the part of the trustees or heirs, or not. He would be deemed an innocent purchaser, and be protected by the same principles who had taken a conveyance of a portion of the property, or received an assignment of an incumbrance secured by it, after the entry of satisfaction on the first mortgage; or if a purchaser before such incumbrance had been removed, made valuable improvements, after its removal he would be deemed in equity to have made them upon the faith of such removal, and would be entitled to protection to their value. It is, however, denied that the administrators and guardian had become acquainted with the true state of the business, until long subsequent to the interests accruing to those who claim to be innocent purchasers and incumbrancers.

I take this to be immaterial, on this ground, that if the trustees had authority, they are responsible to the heirs for the prudent exercise of it, and it comports better with the policy of the law to impose that responsibility upon them which arises from their inattention to a subject which inquiry might have spread fully before them, than to involve those in loss who relied upon the fact, that those who had authority acted prudently.

"I take it to be a fixed and unalterable principle, that a power not coupled with an interest, must be strictly pursued. A devise to executors to sell land, not coupled with an interest in the subject, is a naked power which must be executed by all the executors named in the will, and if one of them dies, it does not survive to the others. If an authority is granted by statute, affecting the property of individuals, it must be strictly pursued: where a power of attorney is special, every thing is void which the attorney does not in strict conformity to his authority. The acts of such persons not in strict conformity with the authority from which their powers are derived, are also void; and all persons claiming to hold, however remote, or however ignorantly, under such defective and void execution of powers, derive no title from them which can aid or support their claims."

"It is plain, that executors or administrators have no interest, legal or beneficial in the personal estate, but are invested only with a legal power over it, just as every trustee has a legal power over his trust property. It is equally clear, that when real estate is converted into personal, by the mode prescribed by the act of as-

(Beltzhoover v. Darragh and others.)

sembly, the administrator does not become entitled to any beneficial interest in it; indeed, in relation to the authority which an administrator is allowed to exercise over the real estate of the decedent, he is the mere creature of the Orphans' Court, deriving his powers from that tribunal, guiding his footsteps by its instructions, and seeking its concurrence in all his acts and measures. The Orphans' Court have authority by the 19th section of the act of *March*, 1794, to direct a sale of the real property of an intestate, for the purpose of paying debts, educating children, maintaining them, binding them apprentices, and the improvement of the residue of the estate. By the 20th section of the same act, before such order can be made the administrators must exhibit an inventory of the personal property, show the state of the debts, and set forth the deficiency of the personal estate to accomplish the several objects for which a sale of the real estate is prayed. The court is required to fix the time of sale, direct the notices to be put up, and a return of the proceedings must be made at the subsequent term, for the approbation or rejection of the court, and any balance beyond what may be required for the exigencies set forth in the petition, is subject to the distribution. By the 1st section of the act of *April*, 1802, the administrator *de bonis non* is authorized to consummate the title, where the administrator making the sale, dies before executing a conveyance. The 4th section of the act of the 27th of *March*, 1813, enacts, that executors and administrators, guardians or trustees may, by leave of the Orphans' Court, put out minors' money at interest upon such security as the court shall allow of, and if such security, taken *bona fide* and without fraud, shall happen to prove insufficient, it shall be the minor's loss. The 10th section of the act of the 7th of *April*, 1807, authorizes guardians to make sale of the estate of minors, and provides that they shall give bond to the Orphans' Court, conditioned for placing the monies arising from such sales at interest on good real, or other securities."

"The first that strikes us, in relation to the authority given to the Orphans' Court to direct a sale of landed estate, is the very guarded steps that are necessary before that court is enabled to make an order of sale; upon the regularity of these steps it depends, whether the Orphans' Court itself becomes vested with jurisdiction over the subject matter, and where irregularities are committed in the steps rendered necessary to confer the jurisdiction, the sale is void, and the purchaser under the order of sale is bound to take notice of such irregularities.

"The next thing to be observed is, the extreme caution which the legislature has exhibited in relation to the surplus remaining in the hands of the administrator, after the objects of the sale have been accomplished, by directing a distribution of such surplus, an act which would have been necessarily derived from the nature of the administrators' authority. A third circumstance is not less

(Beltzooover, v. Barragh and others.)

important; it relates to the authority given to executors and administrators to put out money of minors at interest, upon such security as the court shall approve of. Upon this section I proceed to remark, that the word "*may*" made use of by the legislature, is imperative; it is the duty of the administrator so to apply surplus funds of minors in his possession, and the court have full authority to enforce a compliance with the legislative requisition."

"I assume it as a principle, that wherever a trustee, who would be compellable by a Court of Chancery to perform an act for the benefit of *cestui que trust*, does that act without an order from the court, the same shall be assumed as having been done by its order, subject however, to a review of the court, if circumstances require it. Upon similar grounds, if an administrator is bound to place out a surplus fund at interest, upon sufficient securities to be sanctioned by the Orphans' Court, and he does place that fund out upon securities without applying to the Orphans' Court for its order, the act is to be considered as revocable only by the Orphans' Court, subjected to alteration as future contingencies may require. The only distinction would appear to me to be, that in case the approbation of the court was obtained, the administrator would not become a sufferer from the failure of the securities; if not obtained, he perhaps would; as a testamentary guardian cannot change the nature of an infant's estate, real into personalty, or personal into real, unless authorized by the will so to do, or where it is manifestly for the infant's advantage; and as a guardian appointed by a Court of Chancery, cannot make such change without leave of court, so neither can they exchange securities at their own option, or substitute, without authority, one description of security for another. If this principle holds good with respect to a guardian, whose authority to contract extends to the person and estate of the minor, I can see no reason for restricting it in the case of an administrator, *whose authority over a surplus fund ceases the moment a surplus fund exists*; except in so far as he may be considered as the trustee under the appointment of the Orphans' Court, for laying out on proper security.

Independent of the effect of the acts of assembly referred to, the Orphans' Court have an unlimited jurisdiction over all subject matters that relate to interests and estates of minors. It can force the administrator to a settlement, compel him to pay a surplus in his hands to such receiver as it shall appoint, or direct him to lay it out in such securities as may be deemed sufficient, and enforce all those orders by attachment; more particularly when a surplus fund is once invested by the administrator, does this general jurisdiction of the Orphans' Court attach. It then becomes the guardian and trustee for the minor, and any attempt to divest the power of the court over the funds so invested by an act of the administrator, either by substituting one security for another, or by receiving the

(Beltzhooover v. Darragh and others.)

money, is an act which may render the administrator amenable to the process of the court.

Another thing that is observable is this, that the surplus of the proceeds of land sold by order of the Orphans' Court, for the payment of the debts of the intestate, is distributable as real estate. In such case, the widow is entitled only to the interest of one third of the residue during her life; if any thing further was necessary to show that the authority of the administrator ceased, *quasi* administrator, over the surplus fund arising from the sale of real estate, the case of *Diller v. Young*, 2 *Yeates* 261, would abundantly show it.

“Conceiving them as I do, for the reasons already given that the administrator has no authority given him by virtue of his appointment, to interfere with the real estate of a decedent, that the power to sell under the order of the Orphans' Court, is a power not coupled with the interest, and must therefore be strictly pursued, that the surplus money arising from the proceeds of the sale, has all the attributes of real estate; that the administrator is bound both by express law, and by necessary inference to invest such surplus under the control of the Orphans' Court, and that when such investment is made, whether under the order of the Orphans' Court or without it, the authority of the administrator over the fund ceases, the conclusion necessarily forced upon my mind is, that entry of satisfaction by *John Darragh*, as administrator of the estate of *David Davis*, on the mortgage given to the administrators of that estate, is void and invalid, and that the substitution of the mortgage of *J. L. Glaser*, for that of *Daniel Beltzhooover* was done without authority, and is not binding on the heirs and representatives of *David Davis's* estate. And it is further my opinion that *W. Hays*, whether guardian or prochein amy of the infant heirs of *David Davis*, had no right to consent to the substitution, and that his act in so doing does not bind his wards.

“But as to them the act is voidable merely, and not void. I am disposed to think that the guardian, who was constituted to act until the minors arrived at the age of fourteen, continued his guardianship after their arriving at this age, provided no new guardian was appointed, and that his acts as such, if lawful, ought to be recognized.

“The question to be decided by you is, whether the representatives and heirs of *David Davis*, have done any act by which the avoidable act of their guardian has been confirmed. Is there proof of such assent by *Mrs. Davis*, as ought to preclude her from a recovery; is there evidence of any assent on the part of *Thomas Davis*, one of the minors, after he had become acquainted with the difficulties in which this exchange was involved, and the circumstances under which it had taken place.”

A verdict and judgment were rendered in favour of the plaintiffs.

(Beltzhooover v. Darragh and others.)

Selden, for the plaintiff in error.—Mrs. *Potts* has come into the matter after the entry of satisfaction, and for a valuable consideration; she is therefore to be favoured, if she can be. This is to be looked on as personal property. Land decreed to be sold is money. This debt would go to the representatives of the mortgagees. 10 *Mod.* 316. *Grier v. Huston*, 8 *Serg. & Rawle*, 402. On the repayment of money invested under the provisions of the act of assembly, and directions of the Orphans' Court, the executor may re-invest. But this cannot be treated as money put out, because when done so, it cannot be put out for longer than a year; here the mortgage was payable at seven years. As respects the mortgagor or these claiming under him, this was money. 2 *Yeates*, 361. In 3 *Johns. Ch.* 552, *King v. King*, are cases, showing that where the administrator applies the assets wrongfully, notice of it must be brought home to the party: there must be collusion. 7 *Johns. Ch.* 160. *Field v. Schieffelin*, *Ib.* 17. *Lodge v. Hamilton*, 2 *Serg. & Rawle*, 491. *Grider v. M'Clay*, 11 *Serg. & Rawle*, 224, is express, that the money is personal, and that the guardian has power over it as such. If money, the assent of both trustees was evinced by such on the mortgage and bonds; and the direct release of the guardian, or the *cestui que trust* is sufficient to release it.

Fetterman, contra.—There is no evidence of improvements by *Young*, after evidence of satisfaction; and, as to Mrs. *Potts*, *Poe*, her agent, had notice of all the facts, and she is therefore to be affected. 11 *Serg. & Rawle*, 377. *Petrie v. Clarke*, 2 *Atk.* 121. *Harrison v. Harrison*, 2 *Eq. Ca. Abr.* 742. 10 *Johns.* 425.

Baldwin, same side.—The act was not done for the benefit of the minors, or of the estate; but to oblige the mortgagor. A less security is taken, and this was a breach of trust, both by the administrator and the guardian: as between the parties to this *devastavit*, and the *cestui que trust*, it is not conclusive. Both administrators could lawfully do this. But, one cannot exercise the trust. This is not an ordinary case of administrators. *Snyder v. Snyder*, 6 *Binney*, 497. decides that one has not the power of all. Admission of debt by one administrator will not take debt out of the statute of limitation. *Wallace v Irvine, M. S.* There was actual fraud in misrepresenting the existence of the order of the Orphans' Court, recited in the entry of satisfaction, and the act was void as to any bail or purchaser. Between *Davis's* heirs, and *Beltzhooover* there would not be doubt or difficulty. We contended before the jury, and with effect, that Mrs. *Potts* stood in no better situation; and that *Glaser's* mortgage was purchased by *Poe*, with her money before this transaction. If so, she cannot be a *bona fide* purchaser.

Forward, in reply.—The cause was put to the jury exclusively, on the supposed defect of power, or incompetency of one admini-

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nistrator to do the act. This excluded every other consideration, and if the court be wrong in this, judgment must be reversed. *Jacomb v. Harwood*, 2 Ves. 266, 267. One of two administrators has the same power as one of two executors; one can give an acquittance. The party who seeks the aid of equity must show that he was imposed on. *Puller v. Brady*, 2 Atk. 517. *Darragh* and *Hayes* were liable, and why look to us?

GIBSON, C. J.—The acts of one co-executor bind all the others, by reason of the confidence reposed in them individually, in consequence of which each has full power over the assets. With regard to administrators, who are the depositaries of no confidence whatever, but give security for the faithful performance of their office, this anomaly did not originally hold; the courts requiring, in accordance with the rules of the common law, the concurrence of all. But the law seems now to be settled otherwise, and their acts are (for the sake of uniformity, I presume,) put on a footing with those of executors. But this is immaterial in the investigation of a transaction, in regard to which the authority of persons who happen to be administrators, is derived neither from a testator, nor from the register; and is therefore not to be qualified by an office which serves no other purpose than to designate them as individuals on whom a particular authority has devolved. The business cast on them, was not of a testamentary nature, nor within either their official security or the scope of their official powers, which have regard only to the personal estate. They had a new office, involving new duties, and creating new responsibilities. They were therefore TRUSTEES of an estate that might have been committed just as well to any body else, and by any other designation. Why should the trust be qualified by this designation, when in cases of devises to executors to sell for payment of debts, courts of equity disregard it altogether, holding, notwithstanding the old distinction, that the executor shall in all cases be deemed a trustee, and the money treated as equitable assets, instead of going in a course of administration; and this, whether the devise be of a naked power to sell in the capacity of executor, or the descent be interrupted by a devise of the land to the executor, and his heirs. I certainly do not pretend, that the produce of land sold to pay debts, is equitable assets here, or that we have such a thing; but, the chancery cases on the subject, of which the books are full, serve to show that where an executor is used as an instrument to convert land into money, he does not necessarily act in his official capacity, although in regard to that particular duty, he be the depositary of the special confidence of the testator. What stronger circumstance is there in the case of executors or administrators, acting under an order of the Orphans' Court? We have then the case of two trustees, who sold without any direction as to terms, and took a mortgage for the purchase money, in which the trust is

(Beltzhoover v. Darragh and others.)

recited; one of whom executes, in prejudice of the trust, and without the concurrence of the other, what would be in substance a release; and it is first material to inquire what are the legal, as distinguished from the equitable consequences of the act. The latter shall be considered in the sequel.

At law, where only the legal estate is regarded, the case would be considered as that of two joint mortgagees, neither of whom could release without the concurrence of his companion; the rule being indisputable, that no injurious act, (as this unquestionably was,) of one joint owner shall prejudice the other. Two tenants in common of an advowson bring *quare impedit*, and one of them releases; yet the other shall recover the whole presentation, (*Co. Lit.* 197 B.) So, where one of two tenants in common of a wardship, releases to a person who has ravished the ward, the other shall, notwithstanding, recover. (*Ib.*) But it almost seems like affectation to use authority for a principle so familiar.

The consequence is, that Mr. *Darragh's* acknowledgment of satisfaction, release, or substitution of the one mortgage for the other, (by whatever name it is called,) WAS INVALID AT LAW; and Mrs. *Potts* laid out her money, on the credit of a defective title known to be such at the time. By what possibility then, can she be a purchaser without notice? If there be any principle of equity established beyond dispute, it is, that he who trusts to any thing short of a legal title, perfect at least on the face of it, does so at his peril. Its imperfection, being obvious to the senses, is alone sufficient to put a purchaser on inquiry, and consequently to affect him with notice. In taking an assignment of a debt, secured by the second mortgage, under a belief that the lien of the first was discharged by a release which was defective at law, Mrs. *Potts* therefore acted at her peril; and, an error in the opinion delivered to the jury, on the basis of her being a purchaser without notice, cannot be assigned here, as the fact assumed does not exist.

But there is another, and an insuperable objection to her being protected as a purchaser without notice. It will hardly be denied, that if the acknowledgment of satisfaction had been executed by both of the mortgagees, the transaction might nevertheless have been unravelled between the original parties. And why? Because the mortgagor with a full knowledge of the circumstances, was a party to an act which is a breach of trust, and could therefore, gain no advantage from it. Then to come to the point. Here, both the trust, and the act which was a breach of it, APPEAR ON THE FACE OF THE MORTGAGE DEED. The whole arrangement is stated in the margin; and Mrs. *Potts*, if she knew any thing of the transaction at all, knew the whole truth. If then, the arrangement was originally a breach of trust, she afterwards became a party to it, with, at least, constructive notice of the circumstances, and stands in no better equity than *Beltzhoover* himself, under whom she claims as an assignee.

(Beltzhoover v. Darragh and others.)

I have omitted to notice the defence of *Young*, the terre-tenant, because his improvements were made, with the same means of knowledge which I have attempted to show, are sufficient to affect Mrs. *Potts*; and he is consequently to be postponed.

The question then stands as it would between the original parties; the inquiry being, whether, under the circumstances, equity would aid the defective execution of a release such as this, by considering it as an agreement, and decreeing it specifically. And it is an undoubted rule that no act of the trustee shall prejudice the *cestui que trust*. I shall not examine in what cases the trustee, may or may not change the nature of the trust estate, but refer to Mr. *Fonblanque's* note, (1 *Fonb.* 167,) where the authorities are collected; with this single remark, that where the act of the trustee is at the time apparently prejudicial, a party having notice of the trust, can derive no benefit from it. There is no way to avoid the application of this rule to the case here, but to say that the parties beneficially entitled, had not an interest specifically in the mortgage; but, that the trustees having sold without any direction as to terms, might call in the mortgage money when they pleased; and having pledged the responsibility of themselves, and their sureties for the eventual payment over of the proceeds of the sale, the money stood at their risk, in the hands of the purchasers, and they might well treat as their own mortgage that was taken for their individual security. Far otherwise. The money, is in the place of land, in which the parties beneficially interested, had a specific interest; and after all the purposes for which it was converted have been answered, and no benefit can accrue to any one from having it called in, it would be a narrow construction which would deprive them of the fortuitous advantage of real security, in addition to the personal responsibility of the trustees and their sureties. The very reason why a trustee cannot capriciously change the nature of the trust estate is, that the *cestui que trust* has a specific interest in it, which is to be regarded. The debts being paid, the parties beneficially interested, on coming of age, might have compelled the administrators to assign to them; and they have in effect, attained this object by suing on the mortgage to their own use; but they might at the same time have proceeded on the recognizance of the administrators, and their sureties. Nor can we inquire into their views in adopting the present course. They may pursue on all their securities, or favour particular parties, if they think proper, by pursuing on but one. Nor do I view as of the least importance, that the defective execution of the acknowledgment of satisfaction, has since received the sanction of the other mortgagee, of the guardian of one of the children, and of his ward after he had become of age; the acts of these cannot prejudice the other children. This, then being the case laid before the jury, I cannot perceive that the judge erred, in directing a verdict for the plaintiffs.

(Beltzhoover, v. Darragh and others.)

DUNCAN, J.—The case is very fully and clearly stated in the opinion delivered by the Court of Common Pleas, and the true questions stated. That opinion, as to the power of one administrator, where there are more than one, to enter satisfaction on a mortgage given to the intestate, so as to discharge the lien as to the rights of third persons, *bona fide* acquired, I think cannot be questioned. Nothing can be clearer, than that receipt or satisfaction entered by one administrator on a mortgage discharges the lien. The administrators represent the testator: they are but one person in point of law. One can dispose of the assets, receive money, enter satisfaction, and do every act without the intervention of the others. This, I think, is the law. Public convenience requires that it should be so, and general usage proves the general understanding. Administrators may assign a mortgage; for the assignee of the administrator of a mortgagee may maintain an ejectment in his own name. *Simpson's Lessee v. Ammons*, 1 Binn. 175. The money secured by the mortgage is assets; consequently, the executor or administrator has the power over it. I think I may lay down the rule safely, and in the broadest terms, *that one executor can do any act—not so of trustees*. The signature of one executor is sufficient, but not the signature of one trustee. The power of executors and administrators, as to the disposition of assets, is the same, though their authority proceeds from different sources: executors, from the will of the testator; administrators, from the letters of administration. Lands are equally assets for the payment of debts in the hands of an administrator as of an executor: they may, in both cases, be taken in execution on judgments obtained, and sold by the sheriff. *Mead v. Lord Orvory*, (3 Atk. 235,) settled some very important principles; that executors may assign a mortgage, and that a disposition of assets, by an executor, is good at law, unless done collusively; and, wherever the party has the legal estate for a valuable consideration, it must be a very powerful equity to take it from him. It likewise establishes, that notice of the mortgage being a trust for residuary legatees, and that the parties had notice, is not material. This notice, though material in cases of public trust, is not so in the particular case of an executor; for Lord HARDWICKE very justly says, that this would extend to any case of a will; and, if this doctrine were to prevail of notice to the assignee of an executor, nobody would dare to purchase or take an estate from an executor. That distinguished Chancellor proceeds further, and says, “This is the first attempt, by a residuary legatee, to overturn an assignment by an executor of the assets of the testator. Creditors, even, though they have a demand against the executors for the whole of the assets after the account is made up, yet not by way of specific lien.” He denies that executors are to be considered as trustees, and that therefore the assignment was void, not having a tendency to the due administration of assets, and concludes by resting the assignment on its true ground; that is, fraud between the par-

(*Beltzhoover v. Darragh and others.*)

ties to the transaction, to the assignment, fraud in the executors. It is not pretended that there was any collusive act of the administrators here: the character of those who advised the measure, the character of the sureties in the indemnity bond, and the character of the guardian who assented to it, remove all imputation of collusion. These honourable men all supposed, that the second mortgage would be an adequate security; that *Beltzhoover* would be relieved by the substitution, and the estate of *Davis* not injured; and, if it was, the bond of indemnity would secure the administrators and guardian, and protect the estate of *Davis* from final loss. This agreement was assented to and ratified by all who could assent, and nothing but the fall of property, unexpected by all men, would have brought about any alteration or disturbance.

As between *Beltzhoover* and the administrators, the question would be a very different one: his conduct might be impeached by a concealment of the circumstance of the additional bond assigned to *Poe* being included in the mortgage, unknown to the administrator and guardian; though this might be very difficult to make out, when they had possession of the mortgage, when they received it in satisfaction, and acquiesced in the bond of indemnity. But, as to *Poe* himself, I have some doubts. As to Mrs. *Potts*, I have none, if she was an assignee *bona fide* of the debt secured by the mortgage, and advanced her money on the strength of the bond being secured by the mortgage to *Beltzhoover*; that, as to her, if she stood in that situation, this mortgage, on which satisfaction was entered on the margin of the record, could not affect her right, or postpone her claim. She has a superior equity to the administrators, for this is their suit; and, if Mrs. *Davis* could ratify the acceptance, she has done it: she has, on the record, ratified the acceptance; and her suit against *Glaser*, receipts of money on the second mortgage, ratified by Mrs. *Davis*, by the guardian, and by *Thomas Davis*, are of this character.

As to *Young's* part of the land, he now holds it discharged of all equity. The entry of satisfaction clearly exonerated him; and, being exonerated at law, his equity is equal to that of the distributees, and superior to that of the administrators. He has since made valuable improvements; he might repose in safety, seeing the mortgage was satisfied. How could he bring suit against *Beltzhoover*, to compel him to satisfy a mortgage which had already been satisfied on record? This satisfaction was good by one administrator, and the entry by one is a discharge at law; and there is nothing to affect the conveyance of *Young*, or of Mrs. *Potts*, the assignee.

As to those third persons, Mr. *Darragh*, nor the administrator, (after his ratification,) nor Mr. *Hays*, the guardian, nor the distributees, can impeach it, on the ground of Mr. *Darragh* and Mr. *Hays* being ignorant of the contents of the second mortgage, which on record they acknowledge to have received in satisfaction of the first mortgage. And the presiding judge very properly

(Beltzhoo-ver v. Darragh and others.)

stated, that he had little doubt, that if Mr. *Darragh* had authority originally to substitute the mortgage of *Glaser* for that of *Beltzhoo-ver*, his conduct was such subsequent to the discovery of the imposition practised on him, as would have concluded those whose trustee he was, from recovering as against those who acquired an interest after the entry of satisfaction. But the error into which the court fell, however just and accurate, was the opinion of the acts of one administrator, ratified by the other in the most solemn manner of record, stating the satisfaction not to be valid, because, in this case, they acted not as administrators, but as trustees. Now, my opinion is, that they acted in the character of administrators; that their power was as administrators, and administrators solely; that the proceeds of the sale were assets in their hands, to be distributed in a course of administration; that they held the mortgage as assets for the payment of debts, and for distribution; that neither the creditors nor distributees had any lien on the mortgage. Whenever the Orphans' Court have authorized administrators to sell, their authority over the real estate continues in their character of administrators, *quo modo*, assets from the granting of letters; that is, by petition to the Orphans' Court, decree of the Orphans' Court, sale returned, and confirmed.

The first act of 1705, empowered them, in their character of administrators, to sell for the payment of debts and maintenance of children, on obtaining a decree of the Orphans' Court for that purpose; and, even where there is a return of no children, it was decided in the case of *Humphrey Fullerton*, at *Chambersburg*, that the Orphans' Court had power to direct a sale for the payment of debts where there were no children. *Snyder's Lessee v. Snyder*, 6 *Binn.* 496. The act of 1794, under which this sale was made, does not change, in this respect, the provisions of the act of 1705. The act of 1808, (*Purd. Dig.* 300,) makes no alteration, except that it directs the Orphans' Court to require sufficient security from the administrators, conditioned for the faithful performance of the duties committed to them, on the sale of real estate. Nothing can more clearly prove, that the power is conferred on them in their character of administrators, than the consideration that they alone can exercise it. The Orphans' Court can intrust to it to no one else; the deed could be executed by no one else: and the legislature, by the act of the 2d of *April*, 1802, so construe the law; they provide for a *casus omissus*—the death of an administrator after sale and before conveyance. "In all such cases, it shall be lawful for an administrator of the goods not administered on, of such intestate unto whom administration shall be granted, to and for the executors and administrators of the person so dying, to make and execute deeds to the purchasers."

Thus every line of every law enabling administrators to sell real estate grants them the power as administrators, and in the character

(Beltzhoover v. Darragh and others.)

of administrators and no other, and makes the proceeds assets for the debts, and distributable to the next of kin. The Court of Common Pleas considered the authority of the administrator *quasi* administrator ceased over the surplus arising from the sale of real estate, and that *Diller v. Young*, 2 Yeates, 261, settled the principle. It is apprehended that this is a mistake. He has control over the land as he has over the personal estate. The sale does not, by converting the real into personal estate, change the succession; the surplus goes in the same proportions and interest as the land itself, but still it comes into the administrator's hands in his character of administrator. I do not mean to say, that the administrator can release the lien on lands without payment, as between him and the purchaser; but if he takes a mortgage, and enters satisfaction, and there is a subsequent purchaser without notice, he holds the land discharged of the lien. What clearly proves the authority of the administrator, is, that payment to him of the fund would only be legal payment; satisfaction alone, by him, be legal satisfaction. If he commits a *devastavit*, the act of 1808 provides for that very case: it requires him to give security, sufficient security, conditioned for the faithful execution of the powers committed to him, in making such sale, and to account for and pay over the proceeds thereof, in such manner as the court shall legally decree: just the same security as is given in personal estate, the same distribution, and the same mode of settling the accounts. The administrator is a person appointed by the law, intrusted by the law, required to give security to the satisfaction of the court, as well with regard to the disposition of the surplus arising from the sale of real as of personal estate. His original bonds only comprehended the personal estate. Where a new duty is contemplated, a new security is required; a new administration bond to cover the proceeds of the sale.

An executor or administrator is, in some respects, a trustee: an executor, to distribute according to the direction of the will, an administrator according to the directions of the law. They do not take in their own right, but as trustees for others. Still, the distribution of assets by them is binding, unless there is collusion or fraud, which is not alleged here; and, if it even were found, could not affect third persons.

The administrators may have committed a *devastavit*, though there has been no fraud. I do not say whether they have, under all the circumstances; but it is pretty evident, by taking the bond, Mr. Darragh and Mr. Hayes, the guardians, considered they were running some risk, and they took ample security against it; not only an indemnity, but an obligation, that the bond and mortgage of Glaser shall be sufficient security for the whole amount of Beltzhoover's mortgage to the administrators. Satisfaction was intended to be entered, satisfaction was entered. It was done for the

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very purpose of discharging the land from the first mortgage: no one can doubt this. And I think, under all that has been done by both administrators, the entry of satisfaction and ratification, all that has been done by Mrs. *Davis* and the guardian since, that neither *Young* nor Mrs. *Potts*' interest could be affected by an allegation that this satisfaction was invalid. What would be the situation of the recorder, if this was not a legal satisfaction, he having given a certificate that there was no mortgage but the second unsatisfied? He would be responsible to Mrs. *Potts*, if on the faith of that certificate, she took an assignment of the bond secured by the second mortgage. For my own part, I think he never ought, because satisfaction was entered by one having authority to enter it. This appears to me to be the action of the administrators to disaffirm their own act, to the injury of innocent persons; an act which Mr. *Darragh* and Mr. *Hayes* considered they ran some risk in doing, and from the effect of which they guarded themselves by the most ample security.

On the whole, my opinion is, that the judgment should be reversed, and a *venire de novo* awarded; because I think that each of the co-administrators had a power over the fund which each co-trustee may not possess; and, that as each administrator had all the rights and authority, the entry of satisfaction by one was good at law, and that there is nothing in equity to impeach either *Young* or Mrs. *Potts*. Co-trustees are, in this respect, distinguished from co-executors: the receipt of one co-executor is sufficient; each executor, consequently each administrator, has power over the whole fund—all joining in giving the receipt, or entering satisfaction is not necessary, *Toll. Exec.* 485: though the entry of satisfaction might subject the administrator to an action for *devastavit*, still, as to innocent third persons, it would be *quasi* payment—payment which the administrators cannot gainsay. At law, as well as in equity, a mortgage is merely a security for the payment of money. A mortgagee has nothing but a chattel interest. Notwithstanding their form, mortgages are not considered as conveyances of land, within the statute of frauds. The assignment of a debt, or passing it, even by parol, draws the land after it as a conveyance. The debt is considered as the principal, and the land as an incident only. 11 *Johns.* 534. This chattel the one administrator had power to aliene, to assign, or to deliver up: he had the same dominion over it, as any other chattel of the intestate. The entry of the satisfaction is not necessary to the discharge of a mortgage, any more than the discharge of a judgment. The delivery of the mortgage, or any other discharge by an administrator would be sufficient, unless the act were fraudulent and collusive between the parties, and this would only affect parties to the fraud, not third persons, innocent, *bona fide*, and having an interest in the discharge of the mortgage.

(Beltzhoover v. Darragh and others.)

But, the court being divided, the Chief Justice and Mr. Justice *TOD* being of opinion there was no error, their opinion prevails against the opinion of my brother *ROGERS* and myself; Judge *HUSTON*, not having been present at the argument, and being connected with Mr. *Hayes*, the guardian, declining to take any part.

ROGERS, J., concurred with this opinion.

TOD, J., concurred with the Chief Justice.

HUSTON, J., took no part, being a connexion of one of the parties interested; and the court, being equally divided,

Judgment affirmed.

[PITTSBURG, SEPTEMBER 28, 1827.]

HULTZ against *WRIGHT* and another.

IN ERROR.

In debt for rent, parol evidence is admissible, to show that in making a lease for nine years, rendering rent, it was understood and agreed by all parties, that for the last nine months no rent should be payable.

Hultz, the plaintiff in error, was defendant below. He was sued in debt for rent on an indenture of lease between *Wright* and *Willet*, the plaintiffs below, lessors, and a certain *John Thompson*, lessee, of a tract of land at a certain annual rent, for nine years, ending the 1st of *April*, 1822. This suit was brought for the rent of the last year against *Hultz*, who had come upon the land as purchaser from *John Thompson*, the lessee. *Wright* and *Willet* acted in the business as guardians of *Benjamin Thompson*, the brother of *John Thompson*. The father of *John* and *Benjamin Thompson* had, by his last will, given the rents and profits of the land in question to *Benjamin*, for his support and education, until he should attain the age of twenty-one, and then to *John* in fee simple. On the trial in the court below, the defence was, that for a great part of the last year of the lease; viz. for about ten months, no rent was due to *Benjamin Thompson*, or to his guardians; because *Benjamin* attained his full age in *June*, 1821, and from that time *Hultz* himself was absolute owner of the land, and entitled to all the profits; and that at the executing of the lease it was agreed by parol between the guardians and *John Thompson*, the lessee, that the lease should be drawn to end on the usual day, the 1st of *April*, but that the rent should terminate with the termination of *Benjamin's* interest; viz. in *June*, 1821. To support this defence, the deposition of *Joseph Philips*, who drew the lease and was one of the subscribing witnesses, was offered in evidence. The deposition, in substance, was that the guardians and *John Thompson* came to his, (the witness's,) house, to get the lease written. That the making the lease

(Hultz v. Wright and another.)

for the full term of nine years was a matter discussed and understood by the parties, and that no rent was to be paid for any time after the boy, *Benjamin*, should come of age. That the lease was so drawn, at the suggestion of him, the witness. That he stated to the parties, *Benjamin* could not claim any rent after he came of age, agreeably to his father's will, and they all knew it. That it was well understood no rent was to be paid after *Benjamin's* coming of age; and that he, the witness, did not expect any difficulty would arise from extending of the term beyond the title of the lessors, inasmuch as they were all related. This deposition was objected to by the plaintiffs below, as contradicting the indenture; and, for that reason, was rejected by the court. Exception thereupon by the defendant. He also excepted to the opinion of the court overruling the deposition of *James Hultz*.

Selden argued for the plaintiff in error, and referred to 2 *Johns. Ch.* 593. 3 *Binn.* 588. 6 *Binn.* 482. 1 *Serg. & Rawle*, 466. 1 *Ph. Ev.* 449, 458. 2 *Atk.* 202. 3 *Atk.* 388. *Kirby*, 399.

Burke and *Fetterman*, in their argument for the defendants in error, cited 13 *Serg. & Rawle*, 224, 239. 1 *Ph. Ev.* 447. 7 *Serg. & Rawle*, 60.

The opinion of the court was delivered by

TOD, J.—As to the deposition of *James Hultz*, it was well rejected. It was offered to prove declarations and assurances by *John Thompson* to the defendant below, that no rent would be payable after *Benjamin* coming of age, which clearly was not evidence. But I think there was error in rejecting the deposition of *Joseph Philips*. The matter of receiving parol proof, in cases like this, can hardly now be said to be a question for argument. It was legal evidence, and, if believed by the jury, was conclusive as to the portion of rent in dispute. It was evidence to prove, not only a defect of consideration, the land during the disputed time being not the land of *Wright* and *Willet*, nor of *Benjamin Thompson*, but of *Richard Hultz*, the defendant, but to prove also mistake, or if not mistake, fraud. For either purpose it was admissible. As to fraud, it is not supposed to be necessary to have proof express, that a writing has been obtained fraudulently, in order to admit parol evidence against it on that score: but parol evidence may be admitted to resist the fraudulent use of a writing, in the obtaining of which no fraud can be made to appear. See *Thomson v. White*, 1 *Dall.* 426. There appears no substantial difference between this case, and the common case of defence against a bond or single bill for want of consideration, whether through fraud or mistake. The rule seems to apply here in full force, to consider as paid what in justice and conscience ought not to be paid. It is the opinion of the court that the judgment be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 28, 1827.]

The PHILADELPHIA BANK *against* CRAFT, Sheriff of
Fayette County.

IN ERROR.

A judgment by confession for a sum to be ascertained by the prothonotary, binds the real estate of the defendant only from the time of the liquidation of the sum by the prothonotary.

WRIT of error to the Court of Common Pleas of *Fayette* county.

The plaintiff in error was plaintiff below in this amicable action, to try whether the *Philadelphia Bank* was entitled, out of the money raised by the sale of the real estate of *John Miller*, to be paid the amount of an alleged judgment in favour of the bank, against *Miller*, No. 238, *December Term*, 1821, and the following case was stated, to be considered in nature of a special verdict.

On the 10th of *June*, 1819, *John Miller* executed a writing, as follows, "*The Philadelphia Bank v. John Miller*. Amicable action. In this case, I authorize and empower *Parker Campbell* to appear for me, and confess in favour of the plaintiff judgment against me: sum to be ascertained by the prothonotary, with stay of execution until the 10th day of *June*, 1820. Witness my hand and seal, the 10th day of *June*, 1819.

John Miller. (Seal.)

On which writing, is this indorsement, "By virtue of the within power of attorney, I do hereby appear for and confess judgment against *John Miller* according to the terms within stated, in favour of the *Philadelphia Bank*: sum to be ascertained by the prothonotary. Witness my hand the 10th day of *December*, 1821.

Parker Campbell."

Which writing and indorsement was, on the 10th day of *December*, 1821, filed in the office of the prothonotary of *Fayette* county, and entered of record of *December Term*, 1821, No. 238, in the following terms: "*The Philadelphia Bank v. John Miller*. Amicable action, filed and entered the 10th of *December*, 1821. In this case the defendant authorizing and empowering *Parker Campbell* to appear for him, and confess judgment in favour of the plaintiff, sum to be ascertained by the prothonotary, with stay of execution until the 10th of *June*, 1820, by virtue of which power of attorney *Parker Campbell*, esq. appears for the defendant, *John Miller*, on the 10th day of *December*, 1821, and confesses judgment against the said *John Miller*, according to the terms above stated, in favour of the *Philadelphia Bank*: sum to be ascertained as above. Acknowledged coram, *John St. Clair*, prothonotary."

(The Philadelphia Bank v. Craft, Sheriff of Fayette County.)

On the 10th of *December*, 1822, the following entry is made on the docket in this case: "Judgment liquidated one thousand and forty-seven dollars and forty-seven cents, at the time of judgment, *December* 10th, 1821."

After argument by *Ross*, for the plaintiff in error, who cited *Helvete v. Rapp*, 7 *Serg. & Rawle*, 306, and *Lewis v. Smith*, 2 *Serg. & Rawle*, 142.

Baldwin, contra.

The opinion of the court was delivered by

TOD, J.—Secret incumbrances on real estate are not permitted by our law. Whether a confession of judgment for debt or damages uncertain in amount, without any statement of the cause of action, and without any declaration or document on the record, or in the office by which the amount can possibly be known, is from the time of such confession a lien upon land valid for whatever sum may be afterwards fixed, appears to me to be a question that can scarcely bear a doubt. It has not been contended that such an entry could be brought before a sheriff's inquest to condemn real estate, or that an execution could issue, or action of debt be brought upon it; or that in case of death and deficiency of assets, it could be entitled to preference as a judgment. Indeed, there would be a difficulty, perhaps insuperable, of having even a writ of inquiry of damages upon such an entry. In equity, a decree to account gives no priority in the distribution of assets until the account is taken, and the sum ascertained. 2 *Atk.* 385. In *Helvete v. Rapp*, cited by the counsel for the plaintiff in error, judgment was for a precise sum. In all the other cases cited by the counsel, it will appear that judgment was for a certain sum, or the claim of the plaintiff, if not fixed by the statement of the cause of action, had been identified, or at least limited, by the amount of debt or damages laid in the declaration. For the fullest authority on this head, see *Lewis v. Smith*, 2 *Serg. & Rawle*, 142. A final judgment for money, without any sum, either directly or by reference, would appear no less a solecism than a judgment without naming the parties. To support such an entry as a lien upon land, could produce no advantage or convenience. It might be giving the means of unfair collusion to the parties. It would encourage the grossest negligence, and create many disputes. It would be almost turning this part of the law upside down, and making a judgment to be the beginning of a law suit, when it ought rather to be the end of one. The opinion of the court is, that here is a judgment of the *Philadelphia Bank* against *John Miller*, binding real estate from the ascertainment of the sum, viz: 10th of *December*, 1821, and not before. The judgment of the Court of Common Pleas of *Fayette* county is affirmed.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 28, 1827.]

MEANS *against* TROUT.

IN ERROR.

If the recognizance given on appeal from the award of arbitrators, or a justice of the peace, be defective, the party should be called on by a rule to perfect his bail within a given period, or in default thereof, to have his appeal dismissed: the court ought not to quash the appeal in the first instance.

THIS was a writ of error to the Court of Common Pleas of *Mercer* county, in a suit brought by *Jacob Trout*, the plaintiff below, and the defendant in error, against *Thomas Means*, the plaintiff in error. The defendant arbitrated the case, and an award was rendered in favour of the plaintiff, for forty-seven dollars and eighty-two cents. The defendant appealed, and in the recognizance, he and his surety were bound in one hundred and fifty dollars on condition, that if the plaintiff, *Jacob Trout*, shall obtain a judgment more favourable to him in the event of the suit, he will pay all costs and damages, &c.

On motion of the plaintiff, in the court below, to quash the appeal on account of the defect in the recognizance, the defendant asked leave to file a new recognizance: but the court refused leave, and quashed the appeal.

This was now assigned for error, by *I. W. Foster*, for the plaintiff in error, who contended that the court below ought to have permitted the defendant to file a new recognizance.

Bredin, contra, relied on the practice of the court to quash the appeal, which had constantly prevailed, and had been repeatedly sanctioned by this court.

The opinion of the court was delivered by

GIBSON, C. J.—The recognizance is undoubtedly bad: but the question is, whether the appellee has pursued the proper course. Great hardship has, I fear, been suffered in consequence of the strictness with which these matters have been considered in this court. When bail has been defectively given within the period prescribed, there can be neither injustice nor hardship in suffering the appellant to perfect it as soon as the defect is discovered. Such a practice would be in analogy to bail at the common law. On the other hand, if a defect in the recognizance were irreparable, the appeal would be lost, and a great constitutional right frustrated. Such a mischief would be intolerable; and the more so as it is found to be of daily occurrence. Justices of the peace manifest such a remarkable inaptitude in this particular, as almost to warrant a suspicion that these defects frequently happen by design. I admit that we have often turned an appellant out of court on an exception

(Means v. Trout.)

like this: and were not the mischief become insufferable from the frequency of its recurrence, I would be sorry at so late an hour to adopt a new course; but in cases of this sort where the recurrence of the mischief may be prevented without disturbing what has already been done, the rule of *stare decisis* must yield to the justice and policy of a new practice. The proper course, therefore, will be to call on the appellant by a rule to perfect his bail within a specified period, or in default of it, to have his appeal quashed, and such ought to have been the course here. The judgment is, therefore, reversed with directions to reinstate the appeal, but leaving the appellee to the remedy which has just been indicated.

Judgment reversed.

[PITTSBURG, SEPTEMBER 28, 1827.]

THOMPSON *against* CROSS.

IN ERROR.

After a trial on the merits, the court will not listen to an objection that there was no replication or issue.

ERROR to the Court of Common Pleas of *Mercer* county.

In the court below *Cross* declared against *Thompson* in debt on bond. The defendant pleaded payment with leave. The cause went to trial, and a verdict was rendered for the plaintiff for fifty-four dollars and ninety-eight cents.

The error now assigned was, that there was no replication.

The counsel, on opening the case, was stopped by the court.

PER CURIAM.—We will not permit an exception like this to be argued. We have repeatedly declared, that we will not listen to objections such as this; even though there should have been no issue at all. It would be a scandal to the administration of justice, if we were longer to hear these objections, after a trial on the merits; and, although we will not lightly depart from our own decisions, yet, where we find them producing serious mischiefs, we ought to abandon them. The mischiefs resulting from the frequency of these petty exceptions has become intolerable; and we direct the judgment to be affirmed.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 28, 1827.]

LUFFBOROUGH *against* PARKER and another.

IN ERROR.

Under the act of the 3d of *April*, 1804, for the sale of unseated lands for taxes, it is necessary, in order to make the newspapers containing the commissioners' notice evidence, that with each newspaper in which the notice is published, there should be filed the affidavit of the printer of such paper.

Query, If the land be assessed in the name of *Nathan L.*, whether a sale of it for taxes in the name of *Nathaniel L.*, is valid.

It is no objection to a juror to serve in an ejectment for lands sold for taxes, that he was a purchaser of other lands sold at a subsequent period for taxes. What documents are admissible in evidence to support a sale of unseated lands for taxes, under the act of the 3d of *April*, 1804.

ERROR to the Court of Common Pleas of *Mercer* county, in which the plaintiff in error, *Nathan Luffborough*, was plaintiff below, and *William Parker* and *Joseph Junkin*, the defendants.

Ejectment for donation lot, No. 927, Fifth District, containing two hundred acres.

At the trial *John Forquer*, one of the jurors, was challenged by the plaintiff, on the ground of his having stated that he was a purchaser of a lot sold for taxes in the year 1820, it being admitted that the title under which the defendants claimed, was a deed made to one of the defendants, *Joseph Junkin*, as purchaser at a sale made by *Ezekiel Sankey*, Esq., sheriff of *Mercer* county, for arrearages of county and road taxes, on the 15th day of *June*, A. D. 1809.

The court overruled the objection, inasmuch as the juror was not a purchaser of any lands sold by the said sheriff for arrearages of taxes in the year aforesaid, and directed *Forquer* to be sworn as a juror. The plaintiff excepted.

The plaintiff gave in evidence, a patent from the commonwealth of *Pennsylvania* to *John M'Donald*, for a tract of donation land, No. 927, in the fifth donation district, containing two hundred acres, a conveyance by *M'Donald* to *Abraham Witmire*, and a conveyance by *Witmire* to *Nathan Luffborough*.

The defendants offered in evidence, a paper dated the 29th of *September*, 1804, purporting to be the return of the election of assessor and assistant assessors, for *Sandy Creek* township, in the said county; and by *Hugh Bingham*, clerk to the commissioners of *Mercer* county, proved that this said paper was found among the election returns for that year in the said commissioners' office. To this paper being received in evidence the plaintiff objected; it not being proved by the constable and judges who signed the said paper, their absence not accounted for, nor their handwriting

(Luffborough v. Parker and another.)

proved. The court overruled the objection, and received the said paper in evidence. The plaintiff excepted.

The defendants further offered in evidence three papers, purporting to be the oaths of *Adam Carnahan*, assessor, and *John Montgomery*, and *Ross Byers*, assistant assessors of the said township, made on the 21st of *December*, 1804, before *Thomas Robb*, and proved by Mr. *Bingham*, clerk to the said commissioners, that the said papers were found among the oaths of the assessors for the said year, in the said commissioners' office. To these papers the plaintiff objected, inasmuch as they were not in conformity with the act of assembly, and were not made and taken within twenty days from the date of the election. The court overruled the objection; and the plaintiff excepted.

The defendants produced *Adam Carnahan*, the assessor of the said township, as a witness; who testified, that he did not know whether he had a warrant or not; that his memory did not serve him as to when he was assessor, but, by seeing his name to the return on the duplicate; that the practice was not to go on the unseated lands at that day, and that unseated lands were not assessed by going on the land; that they did not go on the ground, but assessed the unseated land, "in the lump;" that he had made search among his papers and could not find a warrant directed to him from the said commissioners; and that no part of the assessment was in his handwriting, save his own name, nor did he know in whose handwriting it was. The defendants then produced *John Chambers*, as a witness, who stated that he was clerk to the said commissioners in *December*, 1803, and continued their clerk until *October*, 1805, that a warrant was issued by the said commissioners to the assessor of *Sandy Creek* township for the year 1805; and, that he gave it to *Adam Carnahan*, the assessor, and that it was not the practice of the assessors to return the warrants issued to them by the commissioners. The defendants then offered in evidence a paper, purporting to be the return of the triennial assessment of *Sandy Creek* township for the year 1805. To which paper the plaintiff objected; and the court decided that the said paper should be given in evidence. The plaintiff excepted.

The defendants gave in evidence, the minutes of the said commissioners of the said county of the 18th day of *March*, 1807, containing the appointment of *Isaac Holloway*, as assessor for the said township for the year 1807; and, also, gave in evidence the oath taken by the said *Isaac Holloway*, as assessor, for the said year, and also produced *Isaac Holloway*, as a witness, who stated that he had a warrant directed to him as assessor of the said township for the said year by the commissioners, and that he did not return the warrant to the commissioners; that he had searched for it diligently, but could not find it; that in making his assessment he did not go on the unseated lands, but took them from the list furnished to him by the commissioners. The defendants offered

(Luffborough v. Parker and another.)

in evidence a paper, purporting to be a return of the assessment of the unseated lands for the year 1807; and proved by Mr. *Bingham*, clerk to the commissioners, that the said paper was found in the commissioners' office, among the returns of the assessments for the said year, and proved by the said *Halloway*, to be his handwriting: to which paper the plaintiff objected, and the court decided that the paper should be given in evidence; to which decision the plaintiff excepted.

The defendants offered in evidence newspapers, purporting to be the *General Advertiser*, (*Aurora*,) a daily newspaper, printed in the city of *Philadelphia*, commencing with No. 5490, dated *Philadelphia*, the 8th of *September*, 1808, and ending with No. 5518, dated the 11th of *October*, 1808, also twenty-four newspapers, purporting to be the *United States Gazette*, a daily paper, published in the city of *Philadelphia*, commencing with No. 4975, dated the 9th of *September*, 1808, and ending with No. 5000, dated the 8th of *October*, 1808, also twenty-six newspapers, purporting to be *Poulson's American Daily Advertiser*, published in the city of *Philadelphia*, commencing with No. 9910, dated the 9th of *September*, 1808, and ending with No. 9941, (Nos. 9927, 9933, 9934, and 9935, not, however, being among the papers offered,) the said several newspapers, purporting to contain a notice from the commissioners of *Mercer* county, to the owners of unseated lands on which taxes were due for the year 1807; and the defendants produced *William S. Rankin*, Esq., prothonotary of the said court, who stated that the said newspapers were found by him in the said office, among the newspapers and other papers in the said office, relative to the sheriff and treasurer's sales of unseated lands for taxes. The plaintiff objected to these newspapers, as not being marked filed, not accompanied with the depositions of the respective printers, and there being no evidence of the aforesaid notice having been published in the usual numbers printed of the said papers, nor any evidence of their being published at the times or at the place that they purported to be published. The court overruled the objection, and decided that the newspapers should be given and received in evidence; to which decision the plaintiff excepted.

The defendants further offered in evidence a newspaper, the *Crawford Messenger*, dated the 22d of *September*, 1808, published in *Meadville*, containing the notice of the said commissioners to the owners of unseated lands, on which taxes were due for the year 1807; and proved by the prothonotary of the said court, to be found among the other papers in the said office; and, they also produced *Thomas Atkinson*, the printer of the said paper, who stated that the said paper, containing the said notice, was printed by him at the time the said paper was dated; and that the said notice was published in the usual number of papers printed by him; and that he had sent to the commissioners an affidavit with

(Luffborough v. Parker and another.)

the said papers; he also produced a book, the third volume of the *Crawford Messenger*, containing No. 165, of the said paper, dated the 8th of *September*, 1808, and Nos. 166, 167, containing the aforesaid notice, which he stated was printed by him at the time they were dated, and that the said notice was published in the usual number of papers printed by him. The plaintiff, by his counsel, did then and there admit that there was, at that time, no newspaper published in *Mercer* county; and that the said newspaper was the one nearest to the said county, which book, containing the said papers, was also offered in evidence. The plaintiff, however, objected to the said newspapers, dated the 22d of *March*, 1808, and the said book being received in evidence, the court decided that the said newspaper and book were evidence. The plaintiff excepted.

And the defendants, before the said several newspapers were read in evidence to the jury, did further offer in evidence the oath of *Robert W. Hutcheson*, a clerk in the office of the *United States Gazette*, with the notice of the said commissioners to the owners of unseated lands, on which taxes were due for the year 1807, annexed, made on the 8th of *October*, 1808, before *Clement Biddle*, notary public, in the city of *Philadelphia*, proving that the said notice had been published in the said paper for four weeks, (Sundays excepted.) The plaintiff objected to the said deposition being received in evidence, and the court decided that the said affidavit should be received in evidence; to which decision the plaintiff excepted.

The defendants offered in evidence a warrant, dated the 6th of *May*, 1809; issued by *Ross Byers*, *David Courtney*, and *Joseph Shannon*, commissioners of *Mercer* county, directed to *Ezekiel Sankey*, Esq., sheriff of the said county, commanding him to sell certain lands described in a schedule annexed thereto, but no schedule was annexed to the said warrant, nor any description of the said lands contained in the said warrant; and, also, offered therewith a book, or list, indorsed "Unseated land—sheriff list—1807:?" and, also, offered a written advertisement, on which was indorsed the deposition of *Ezekiel Sankey*, sheriff of the said county; and then Mr. *Bingham*, clerk to the said commissioners, before sworn as a witness, stated that he found the warrant and list in the said commissioners' office, among the duplicates and sale lists. *Joseph Shannon*, was also sworn as a witness, and stated that he was a commissioner at the time the warrant to the said sheriff was issued; that no schedule or list describing the unseated lands, on which taxes were due for the year 1807, was annexed to the said warrant, but that the commissioners directed their clerk to make out a list of unseated lands for the sheriff; that *John Stewart* was then clerk for the commissioners, who is deceased; that the list is in the handwriting of the said *John Stewart*, and the advertisement in the handwriting of the said clerk, and that the book offered, or list, is the book, or list, made out by the said clerk for the sheriff; but

(*Luffborough v. Parker and another.*)

whether it was, or was not, given to the sheriff, he could not tell. The prothonotary of the said court, stated that the advertisement was found by him in his office, among the other papers. Whereupon the plaintiff objected to the said warrant, the said book, or list, and the advertisement, being received in evidence, but the court overruled the said objection, and decided that the said warrant, book, or list, and advertisement, should be received in evidence: whereupon the plaintiff excepted.

The defendants, by their counsel, further offered in evidence, a deed from *Ezekiel Sankey*, Esq., sheriff of *Mercer* county, to *Joseph Junkin*, for the lot No. 927, fifth donation district, containing two hundred acres, sold for county and road taxes for the year 1807, stated in the said deed to amount to three dollars and thirty-seven and a half cents, and costs stated in the said deed to amount to seven dollars and twelve and a half cents, dated the 24th of *November*, 1809. No evidence was given that any road tax was assessed, or due, on the said tract of land for the said year. They, also, offered in evidence a bond, gave by *Joseph Junkin* to the said sheriff, purporting to be for the surplus money of the sale of the said tract of land, dated the 15th of *June*, 1809, not marked filed: and also proved, by *William S. Rankin*, Esq., prothonotary of the said court, that he found the said bond tied up with the bundle of bonds in the said office, in the box; it did not appear on the said bundles at what time the bundles were deposited or filed in the said office. Whereupon the plaintiff objected to the said deed and bond being received and given in evidence, and the court overruled the said objection, and decided that the said deed and bond should be given in evidence. To which decision the plaintiff excepted.

Third point made by the plaintiff's counsel, on which the court was requested to charge the jury.

3. Whether a variance in the name in which the land is assessed from the one in which it is advertised and sold, is not fatal, as it ceases to be notice to the owner, of taxes being due, which is the object of the law in directing notice to be given in the newspapers, &c.

Extract from the charge of the court to the jury:—

“This bond for the surplus money, was brought by the prothonotary from his office, as an office paper, and is to be considered as being filed, though it is not so indorsed. But, when filed, does not appear. If not filed till after suit brought, it would be illegal; it would be a fraud in slipping it into the office at an after day. The plaintiff has not proved such fraud, and the jury is not to presume it without proof.

“The third point filed.—The majority of the court say, that the variance between the assessment and sale, &c., of *Nathan* and *Nathaniel*, is not fatal; but is cured by the fifth section of the act of the 3d of *April*, 1804.”

(Luffborough v. Parker and another.)

Errors assigned:—

1. The court erred in overruling the plaintiff's challenge to *John Forquer*, as a juror in this case.

2. The court erred in receiving in evidence the paper, purporting to be a return of the election of assessor and assistant assessors of *Sandy Creek* township, dated the 29th of *September*, 1804, and the oaths of the assessor and assistant assessors.

3. The court erred in receiving in evidence, the paper purporting to be the return of the triennial assessment of *Sandy Creek* township, for the year 1805, and the paper purporting to be the return of the assessors of the said township, for the year 1807.

4. The court erred in receiving in evidence the newspapers, stated in the bill of exceptions, and the deposition of *Robert W. Hutcheson*.

5. The court erred in receiving in evidence the warrant from the commissioners of *Mercer* county, to *Ezekiel Sankey*, sheriff of *Mercer* county, dated the 6th of *May*, 1809, and the list, indorsed "Unseated lands—sheriff list—1807:" and the advertisement, and deposition of *Ezekiel Sankey*.

6. The court erred in receiving in evidence the deed from *Ezekiel Sankey*, sheriff of *Mercer* county, to *Joseph Junkin*, for lot No. 937, in the fifth donation district, and the bond gave by *Joseph Junkin* to the said sheriff, purporting to be for the surplus money.

To the charge of the court—

1. The court erred in stating to the jury that the bond for the surplus money, should be considered as filed, though not so indorsed.

2. The court erred, in their charge to the jury, on the third point made by the plaintiff's counsel.

Bredin, for the plaintiff in error.

First Error.—Rejection of plaintiff's challenge of *John Forquer*, a juryman. The reason assigned was, that he purchased in 1820, land sold for taxes under the act of 1815. This land was sold under the act of 1804: and by that act, as well as the act of 1815, the jury, in certain cases, may value the improvements made by the purchaser.

Second Error.—The return of the election of assessor ought to have been proved by the oath of the person making the return. We say too, that the oath of the assessor was not evidence, because it does not appear to have been taken within twenty days after the election.

Third Error.—The assessment was void, because it was proved by the defendants themselves, that the assessor did not go on the ground. Their duty is to value the land at what it will sell for in cash, which cannot be done without examining the land. He referred to the act of the 11th of *April*, 1799, section 8, 3d of *April*, 1804, section 1, 2.

(*Luffborough v. Parker and another.*)

Fourth Error.—The newspapers were not evidence. There ought to have been the affidavit of one of the printers—here the affidavit was by the printer's clerk, before a notary public. The proof was neither according to the act of assembly, nor the common law.

The notary had no power to take this oath—if false, *it was not perjury*. Act of 5th of March, 1791, *Purg. Dig.* 102. The affidavit of the clerk, did not say that the advertisement was published *in the usual number of papers*, which the act of 1804 requires.

Fifth Error.—In receiving in evidence the warrant from the commissioners of Mercer county, to *Ezekiel Sankey*, sheriff. It was not evidence, because it did not contain a description of the lands to be sold, either in the body of it, or by references to a *schedule annexed*.

We objected also, to the sheriff's advertisement, because not set up at the court house, (as directed by the act of 1804.)

Sixth Error.—In receiving in evidence the deed from *E. Sankey* to *Joseph Junkin*, for lot No. 927, in the fifth district of donation land, and the land by the said *Junkin*, to the sheriff, for the surplus money.

All the requisites of the law must be complied with. *Sutton v. Nelson*, 10 *Serg. & Rawle*, 238. *Wistar v. Kammerer*, 2 *Yeates*, 100.

Charge of the Court.

First Error.—After what has fallen from the court, I relinquish this point.

2. Error in charging, that the land assessed in the name of *Nathan*, and advertised and sold as the land of *Nathaniel Luffborough* was a good sale, the defect being cured by the 5th section of the act of 3d of April, 1804. 2 *Yeates*, 330.

Banks and Foster, for the defendants in error.

On the intimation of the court, the counsel confined their argument to the fourth bill of exceptions, and the second error assigned in the charge of the court.

Fourth Bill of Exceptions.—We say, the intent of the act was, that the affidavit of *one printer*, was sufficient evidence of the publication in *all the three papers*.

Second Error in the charge of the Court.—Land advertised and sold in the wrong name.

The 5th section of the act of the 3d of April, 1804, cures an error, in *taxing or selling* in wrong names.

Moore, in reply, for the plaintiff in error.

We took our exceptions in this case, not in a litigious spirit, but with a view of having the law settled in this which was a leading case.

First Bill of Exceptions is—Challenge of a Juror.—I shall not argue this, after the opinion expressed by the court.

(Luffborough v. Parker and another.)

Second Bill of Exceptions.—I leave this on the argument of my colleague.

Third Bill of Exceptions.—An assessor cannot value land without going on it, and he is furnished with a draft of each tract, that he may go on it. I do not say he should go over the whole of each tract; but he should go to it, and take at least a cursory view; by which he may determine, whether it is of the quality of the adjoining lands. The donation lands are all numbered at the north-west corner.

Fourth Bill of Exceptions.—Evidence of the *Philadelphia* newspapers. We have three objections to *Robert W. Hutcheson's* affidavit.—1. He was not a printer, but the clerk.—2. It was taken before a notary.—3. It does not say, that the advertisement was published in the usual number of papers.

We say, moreover, that the newspapers were not evidence, because the affidavit of *one printer of each paper* was not produced.

We say, too, that *Atkinson*, the printer of the *Crawford* newspaper, was not a legal witness. His affidavit ought to have been filed according to the act of assembly.

Fifth Bill of Exceptions.—The warrant of the commissioners does not describe the land, nor was the schedule referred to, annexed to the warrant. A warrant referring to a schedule, *not proved to have ever existed*, is bad. 8 *Serg. & Rawle*, 344.

In this bill is also included the objection, that no advertisement was proved to have been put up by the sheriff, at the court house door.

Sixth Bill of Exceptions.—Two dollars and twelve and a-half cents was due for county tax, and one dollar and thirty-seven and a-half cents, road tax. The sheriff advertised and sold for both these taxes, though there was no proof of any road tax being due; no evidence of any assessment of road tax. The bond for *surplus* was, therefore, taken for one dollar and thirty-seven and a-half cents too little, the one dollar and thirty-seven and a-half cents road tax being deducted from the price for which the land was sold. A complete chain of title must be made out by the purchaser under a sale for taxes. *Birch v. Fisher*, 13 *Serg. & Rawle*, 208. The commissioners had no right to sell for a tax which was not due.

Second Error in the charge of the Court.—Advertisement of sale of *Nathaniel Luffborough's* land, is no notice to *Nathan Luffborough*.

We request the court to give an opinion on each point, and file it.

The opinion of the court was delivered by

GIBSON, C. J.—None of the errors merit particular consideration but two; the others relating to official documents found in their

(Luffborough v. Parker and another.)

place, or to evidence incontestibly competent. My remarks, therefore, shall be confined to these two.

To show that notice of the sale under which the plaintiff claims had been given, the counsel produced the *Crawford Messenger*, duly authenticated, and containing the advertisement which the law requires. He then produced three daily newspapers, published in *Philadelphia*, and containing the same advertisement, which were found in the prothonotary's office; *but without an affidavit by any of the printers, that the advertisement had been published in the usual number of his papers.* These were offered to the jury, and admitted *en masse*. Following this, supplementary proof was made by the affidavit of a clerk of one of the printers, which was sworn to before a notary, and which, as well for that reason, as for not having been filed along with the paper to which the clerk referred, was incontestibly incompetent. But were this otherwise, the principal question would still remain, because as to two of the newspapers, there was no auxiliary evidence whatever, except what may be supposed to arise from their having been found in the proper office. The question, therefore, is whether a newspaper not authenticated by the affidavit of the person who has printed it, is competent evidence.

By the 3d section of the act of the 3d of *April*, 1804, it is provided that, "It shall be the duty of the said county commissioners, to file in the prothonotary's office, one at least of *each* of the newspapers in which they have published their general notice; which newspaper so filed, together with the affidavit of at least *one of the printers* that the aforesaid notice was published in the usual number of *his papers*," shall be taken for sufficient evidence of notice. Do these words "*one of the printers*," relate to one of all the printers who shall have published the notice; or to one of the printers of each newspaper, where any of the newspapers shall have been published by printers in partnership? The latter is my construction.

Of what was the legislature speaking, when it used the words in question? Not of the newspapers collectively, but of each of them respectively. The natural and obvious mode of construction, is to refer the words to the subject matter of the clause, "*each* of the newspapers" in which the notice shall have been published. This construction is further recommended by its avoiding the imputation of want of reason and good sense, with which a contrary one would charge the legislature. In directing notice to be given in four newspapers, it cannot be supposed the legislature was indifferent to its publication in more than one; if so, we must believe the intention was to require proof of publication in more than one; and that proof of the fact should reasonably and naturally follow from the evidence. But how proof of publication in a newspaper in *Crawford* county, should be taken for proof of publication in three newspapers in *Philadelphia*, is what I cannot under-

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stand. The legislature surely did not intend that the affidavit of any one but the printer of the particular paper, should be proof of publication.

It is supposed, that as documents filed in the proper office, and produced by the proper officer, these newspapers are competent evidence at the common law. But it is only by force of the act of assembly that they can pretend to the character of documents; so that the question comes round to the point from which it started: are they such documents as the act requires? At the common law, a newspaper does not prove itself, evidence being always required that the copy produced is what it purports to be; not a particular thing fabricated, perhaps for a sinister purpose, but an individual copy among many published collectively. It is certain, the legislature thought that evidence, in addition to the supposed intrinsic evidence of the newspapers themselves, not only proper, but indispensable; and it was to provide for this, that the affidavit of the printer was declared to be sufficient.

The other exception is, that although the land was assessed in the name of *Nathan Luffborough*, it was sold in the name of *Nathaniel*. At the common law, such a variance would be material; but in the 6th section of the act of 1804, it is declared, that sales of unseated land "shall be valid and effectual, although the land may not have been taxed and sold in the name of the owner thereof." Here it *was* taxed in the name of the owner, but sold in the name of another: and I cannot perceive that the case is worse for the purchaser, than if it had been both taxed and sold in the name of a stranger. I am of opinion, that the judgment be reversed only on the preceding point.

DUNCAN, J. delivered an opinion concurring on the first point, but dissented on the second. ROGERS, J., and HUSTON, J. were for affirming on both points; and TOD, J., concurred with GIBSON, C. J.: so that the judgment was reversed on the first point.

Judgment reversed.

[PITTSBURG, SEPTEMBER 18, 1827.]

JOHNSTON *against* GRAY.

APPEAL.

M., on the 17th of *February*, 1813, by articles of agreement, stated he had sold to I., a tract of land, payable three hundred dollars in hand, one hundred dollars in thirty days, four hundred dollars on the 2d of *April*, 1815, and four hundred dollars on the 1st of *April*, 1816; he was to give possession on the 2d of *April*, 1815, M. to enjoy the right of redemption at any time before the 2d of *April*, 1815, and possession till then. On the same day, he made a deed to I., with a clause that if M., his executors, &c. (the word assigns being struck out,) should pay or cause to be paid to I., four hundred dollars with interest, &c., on the 1st of *April*, 1815, then the bargain and sale to be void. On the 17th of *February*, 1814, M., sold to G., who tendered I. the four hundred dollars, before and on the 1st of *April*, 1815: *held*,

1. That this was a mortgage from M. to I.
2. The restriction of the right of redemption to the mortgagee personally, was inconsistent with the nature of a mortgage and void.
3. The tender by G., was good, though he did not state in what capacity he tendered, whether as purchaser or agent of M.

Where there is no variance or contradiction in the testimony, but it is all consistent and express as to the facts, if the judge in charging the jury express the legal result of the whole evidence, he is not to be considered as taking the facts from the jury.

APPEAL from the decision of the Circuit Court of *Allegheny* county held before TON, J.

This was an amicable action, instituted to decide who was entitled to the surplus, after paying the judgment creditor, arising from a sheriff's sale. The narr. stated, after premising certain facts, that a discourse was had, in which the plaintiff declared, that by virtue of a certain deed from *Henry M'Kellip, jr.*, to the said *Joseph Johnston*, he the said *Johnston* was entitled to have and receive from the sheriff and purchaser at sheriff's sale, *all the amount* of money bid for said land, beyond the amount of debt, interest, and costs of the judgment on which it was sold; and the defendant denied this and a bet, &c. The plaintiff called a witness, who produced the following writing: "17th of *February*, 1813, articles of agreement between *H. M'Kellip* and *Joseph Johnston*, whereby *M'Kellip* stated he had sold to *Johnston*, all that tract of land whereon he, (*M'Kellip*,) then lived, at eight dollars per acre, containing one hundred and fifty acres, strict measure, payable, three hundred dollars in hand, one hundred dollars in thirty days, four hundred dollars on the 2d of *April*, 1815, and four hundred dollars on the 1st of *April*, 1816. That the said *M'Kellip*, is to give *Johnston* unincumbered possession on the 2d of *April*, 1815. The said *M'Kellip* to enjoy the right of redemption, at any time before the 2d of *April*, 1815, and to enjoy the possession of the place to that time;" on this article were

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indorsed receipts for three hundred dollars, at date of articles, one hundred dollars on the 17th of *March*, 1813, and four hundred dollars on the 26th of *February*, 1815.

"17th of *February*, 1813, deed from *H. McKellip* and wife, to *Joseph Johnston* for the same land, consideration, eight dollars per acre, or twelve hundred dollars," describing it by courses and distances and quantity, with general warranty, and then followed this clause: "and the said *Joseph Johnston*, for himself, his heirs, executors, and administrators, doth covenant, promise, grant, and agree to and with the said *Henry McKellip*, his executors, administrators, and (assigns,) that if he the said *Henry McKellip*, his executors, administrators, (or assigns,) shall and will, and truly pay well, or *cause to be paid* unto the said *Joseph Johnston*, his executors, administrators, or assigns, the just and full sum of four hundred dollars with interest, at or upon the 1st day of *April*, 1815, with the expenses of executing this conveyance, then the above bargain and sale to be void to all intents and purposes, any thing herein contained to the contrary notwithstanding.

"*N. B.* The word assigns in the 57th and 59th line struck out before signing." *Joseph Johnston* did not sign this indenture; it was acknowledged by *McKellip* and wife the same day, and recorded on the 26th of *February*, 1813. Also the plaintiff read a release of *McKellip* to *Johnston* of the equity of redemption without date; but acknowledged on the 11th day of *May*, 1814, and recorded the same day, in these words, "for a valuable consideration heretofore received by us from *Joseph Johnston*, we do hereby release all equity of redemption which we now have, or hereafter may have, of, in or to the foregoing premises or tract of land, hereby confirming and rendering the grant absolute, which was conditional, so that the said *Joseph Johnston* may have and enjoy in the said bargained premises, an absolute and unconditional estate in fee simple;" this was indorsed on the deed of the 17th of *February*, 1813. *McCreary*, the witness, produced four single bills, the consideration of the release of the equity of redemption, each for two hundred dollars, all dated the 11th of *May*, 1814; the first payable by *Johnston* to *McKellip*, the 1st of *April*, 1817, the second, the 1st of *April*, 1818, the third, payable to *McKellip*, or *Jane* his wife, the 1st of *April*, 1999, and the fourth payable to *McKellip* or his wife the 1st of *April*, 2000. These were written by *Johnston's* son, and whether the two last were made payable in 1999, and 2000, by mistake or fraud, was not agreed, and the witness said "these were put into my hands the 11th of *May*, 1814, to be kept till the termination of the dispute, and I have had them ever since." He also produced the bond from *Johnston* to *McKellip*, dated the 17th of *February*, 1813, for four hundred dollars, payable the 1st of *April*, 1816, on which was indorsed, "7th of *February*, 1814, to be in force if *Johnston* gets my place on the 2d of *April*, 1815, otherwise, to be void and of no

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effect." On the 2d of *February*, 1814, *M^cKellip* entered into articles of agreement with *James Gray*, by which he covenanted on or before the 20th of *March*, 1815, to convey and assure to *Gray*, his heirs and assigns, the one hundred and fifty acres, &c., being the same which *M^cKellip* by indenture, &c., had sold and conveyed to *Johnston*, with a clause of redemption. The price was twelve dollars per acre payable, &c., and a reserve of twenty acres, during the lives of *M^cKellip* and wife, two hundred dollars paid in hand, six hundred dollars payable before the 1st of *April*, 1815, and the residue in small instalments. This was acknowledged and recorded the 2d of *March*, 1814. 20th of *February*, 1815, *Johnston* paid *M^cKellip* four hundred dollars, the amount of his bond, due the 2d of *April*, 1815. There was then shown the record of a suit, *John M^cKellip*, for the use of *George Williams* against *H. M^cKellip*, in which was a report of arbitrators for two hundred and nine dollars, on the 21st of *October*, 1812, an appeal and trial, and verdict and judgment for the plaintiff in 1817; this bound the land from the date of report; and, on execution on this, the land was sold for two hundred and ninety dollars and fifty cents; the debt, interest, and costs were paid to the plaintiff in the judgment, and the overplus, which exceeded two thousand dollars, was claimed by the plaintiff in this suit.

M^cCreary, the witness, then proved, that *M^cKellip* being embarrassed, and among others indebted to *Johnston*, applied to *Johnston* for a loan of money, and a mortgage was drawn by witness. *Johnston* would not give the money on a mortgage, it was destroyed, the foregoing writings then drawn; there was an express agreement that no stranger should purchase; for this reason, the word *assigns* was struck out of the clause of redemption. *Johnston* said if the land had to go from *M^cKellip*, that he had the first right as he paid the first money. After the witness had drawn it, the word, *assigns*, was struck out at the suggestion of *Johnston's* son. Witness drew the writings according to the agreement of the parties; witness had heard *Johnston* say often, that *Gray* tendered him the four hundred dollars; it was admitted this was in the fall of 1814. It was also proved, that *Gray* tendered the four hundred dollars and interest to *Johnston*, on the 1st of *April*, 1815. *Adam Johnston* (son of the plaintiff,) proved that in 1814, *M^cKellip*, tendered back to *Gray*, the two hundred dollars, which he had paid *M^cKellip* on his purchase, that *M^cKellip* got the money from *James Johnston*, and when *Gray* refused to receive it, *M^cKellip* gave it back to *Johnson*.

The judge who tried the cause did not reduce the charge to writing. Several errors were alleged in that charge, which may be reduced to two.

1. That the judge charged, that on the face of the papers, the deed and article of *February*, 1813, amounted to a mortgage and

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no more for the four hundred dollars then lent; and that the parol evidence, if believed, did not alter the case.

2. That this being the case, the clause restricting the power of redemption to the party, was void.

Baldwin, for the appellant.

1. There was to be no redemption, after the 1st day of *April*, 1815. If not then redeemed, the transaction was to become a sale. Equity will relieve against an agreement of this sort, only where the intention was exclusively a loan. Here a loan was to be a purchase on the happening of a contingency, and equity cannot relieve against the clear intention of the parties. Unquestionably they intended more than a pledge. Here there is no covenant of repayment. 1 *Yeates*, 579. 5 *Binn.* 499. 1 *Call.* 280. 2 *Call.* 420. 9 *Serg. & Rawle*, 446. The sale shall be absolute wherever it appears the parties intended it to be so. The *English* cases also recognize the same principle. 1 *Vern.* 268. 3 *Vern.* 190. *Ca. in Ch.* 220. 2 *Ch. Rep.* 26. Time may be made of the essence of the contract, 4 *Dall.* 347; otherwise, where security and not time, is the object of the contract. 2 *Bro. P. C.* 265. There may be a mortgage which may be a conditional purchase. 5 *Bro. P. C.* 154. Once a mortgage, and always a mortgage is not of universal application. *Prac. in Ch.* 95. 1 *P. N.* 268. 2 *Atk.* 494. 2 *Vent.* 364. *Pow. Mort.* 156, 157. 7 *Cra.* 215. The question is, was it intended as a mortgage in substance, and put into this form as a cover? Here, the parol evidence ought to have been left in connexion with the writing, to the jury to judge of the actual nature of the transaction. Whether a mortgage or not always depends on the circumstances.

2. The right of redemption was personal, the word assigns was struck out, expressly to have this effect. The tender by *Gray* went for nothing, even if made as the agent of *M'Kellip*; for the period had elapsed.

3. Mistake in the date of the bonds is not evidence of fraud; and should not so have been left to the jury.

4. In charging to find a general verdict for the defendant. If this even be a mortgage, *Johnston* ought to be reimbursed for what was due.

Forward, contra.—All other questions are subordinate to this, whether this was a mortgage. It is in evidence, that the parties contemplated a mortgage, and one was drawn—*Johnston* objected to the word redemption; *M'Kellip* was coerced into the contract. *Pow. Mort.* 45, 46. The right of redemption may be lost by delay, but that is a distinct circumstance. *Pow. Mort.* 173, 174. That the money was not advanced all at once, makes no difference; the mortgage is a security for all subsequent advancements. 1 *Cruise*, 141, sect. 26, 27. Right of pre-emption may be secured, but then it is only in case the mortgagee will give as much as any one else. Not

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that the estate shall in the mean time be tied up; for, that would be oppressive. The right of redemption is an interest, and may be made the means of raising money to pay the loan. But there was a tender in fact both at the day and before the day, by which *Johnston's* estate, of whatever nature, was divested. 6 *Bac.* 450. No right exists to claim interest after tender.

Baldwin, in reply.—Where a benefit or kindness is intended, it may be restricted to the person, and not extend to an assignee.

The opinion of the court was delivered by

HUSTON, J., (after stating the two points before mentioned.)—The cause must eventually turn on these points, and in discussing them, I shall notice some matters discussed in the argument, intimately connected with, if not depending, on how these two were decided.

The rule that what is once a mortgage, shall always be considered a mortgage, though stated as a general rule, will perhaps be found subject to several exceptions. Length of time, together with the subsequent conduct of the parties, have often varied it—but I believe it is never varied by clauses inserted in the writings at the time of the loan of money. The needy borrower is not considered as treating on equal terms with the lender—hence the lender may stipulate for the pre-emption if the borrower sells, yet he has not been permitted, at the time of the loan, to stipulate that he shall in a certain event become the purchaser at a price then agreed on. The whole power of the court is founded on the idea that a needy man requires protection against the effect of his own agreements with one who having the power to relieve him from present distress, was found too often to grant such relief on unconscionable terms. A common mortgage is as plain and express an agreement for an absolute sale in case the money is not paid on the day as can be expressed. Yet it has long ceased to be any thing else than a security for money. And it would be an imputation on the administration of justice, if the same agreement differently expressed by the scrivener, though not more plainly, should have a contrary effect. If then the transaction was really a loan of money, secured on land, it is nothing more, whatever language may be used in expressing the contract, or whether that contract is all contained in one instrument, or divided among several. And as in a plain express mortgage, the right of redemption is a right inseparable from the estate of the mortgagor, it is equally an essential right in him, though the agreement be expressed in a more complicated form and manner. The right of redemption cannot be destroyed or taken away, and of consequence cannot be restrained or fettered—for if it could, it would soon cease to exist. If this be a mortgage then, the attempt to confine the right of redemption to the mortgagor personally, as being a restraint on that right, would be void—it would in most instances be equivalent to denying the

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right altogether—it tends to disable him to borrow, and restrains his right of raising the money by sale; in short, in almost all cases, it renders the right of redemption worth nothing.

Was this a mortgage? On this it seems to be impossible to doubt—it was a loan of money—it might be repaid in a day certain—but says the agreement, if not paid then, the mortgagee may pay or must pay four hundred dollars, and other four hundred dollars, and become purchaser. The mortgagee himself knows it to be only a mortgage, and treats it as such by purchasing the equity of redemption. If that had been done before the mortgagor had sold to *Gray*—if the eight hundred dollars agreed upon at the time of the loan, and the eight hundred dollars agreed to be given for the equity of redemption had been paid, and a *long time had been suffered to elapse*, I do not say what a court would have decided—that case is not before us.

If this be considered a conditional sale, in what respect would the situation of *Johnston* be better? the condition was performed to the letter, and in its spirit; the four hundred dollars lent was rendered before the 1st of *April*, 1815, and on that day. I do not rely solely on the phrase that *M^cKellip* should pay or cause to be paid, though if necessary, they might be relied on. There did exist in *M^cKellip* a right of redemption—that was not taken away merely by striking out the word assigns; and an express covenant not to raise the money by sale, extorted by a lender from a borrower, would not have availed.

Other objections are made, that *Gray* did not state whether he made the tender in 1814, and that on the 1st of *April*, 1815, as the agent of *M^cKellip*, or in his own right as purchaser. It would be strange that a tender made by a man who had good right to make it, should be considered bad because he was not asked, and did not state in what capacity he acted—as a purchaser whose title was on record, he had a right to tender and redeem—and as he did not pretend to act in any other capacity, the tender is good. It was alleged as error, that the judge told the jury, that on the face of the writings it was a mortgage; and that the parol evidence, if believed by them, also made it a mortgage—and this is called taking the facts from the jury. I should not have noticed this, if the same objection had not been made in several other cases at this term. There was no contradictory statement in the testimony; and the court was bound to give an opinion on the effect of it. The objection seems to be, that the judge ought to have repeated every sentence of it, and concluded each sentence, “If you believe this sentence, it is a mortgage.” If he had done so, it would have been novel, and, like most novelties, wrong! There may be cases where several acts are necessary to entitle a party, and where his right does not arise until he has performed each of those acts; and in such case, a judge must so direct a jury. There are other cases where the state of a single fact is to be collected from testimony—

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if that testimony is variant, the jury will be told the law, as it would be if the facts, found in one way, and as it would be if the facts are found to be otherwise. When the evidence is all consistent, and express as to the facts, the only direction can be what was given here.

From the entry of the amicable action, it would seem the intention was to ascertain who had a right to the money in the sheriff's hands—but the issue is confined to the point, whether *Johnston* had right to the whole of it. He claimed to be purchaser, and as such, claimed the whole. His right to the four hundred dollars originally advanced by him, and interest up to the 1st of *April*, 1815, is not only admitted, but it has been actually paid him, and received without prejudice to this suit. We have been asked to give an opinion, as to who is entitled to this money—this to prevent further litigation—on the facts before us, and if no other facts exist, *Johnston* is entitled to the four hundred dollars advanced in 1813, and interest.

And on the facts in evidence, and if no contradictory facts exist, he is not entitled to receive out of the money in the sheriff's hands the four hundred dollars he paid *M'Kellip* on the 20th *February*, 1815. He had legal notice on the 2d of *March*, 1814, that *M'Kellip* had sold to *Gray*—and actual notice in the autumn of 1814, by the tender made by *Gray*. His payment to *M'Kellip* afterwards, if not, under all the circumstances, fraud, was at least folly. He could not interfere with or embarrass the contract between *M'Kellip* and *Gray*, or acquire any further lien on the land by giving *M'Kellip* money, which he knew *M'Kellip* had no right to receive.

As to the residue of the money in the sheriff's hands, we have no facts on which to give an opinion, and we give none. *M'Kellip* is not before us—how he and *Gray* stand, or what at this time are the respective rights of *M'Kellip* and *Gray*, we know not.

The charge of the judge being correct on all the facts of the case, and the verdict conformable to the law and evidence, the motion for a new trial is overruled, and judgment affirmed.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 25, 1827.]

LYNCH and others, Sureties of the Sheriff, *against* The Commonwealth, for the use of W. BARTON, for the use of J. WOLVERTON.

IN ERROR.

The suit on a sheriff's bond must be a separate one by each individual, who has sustained injury: one person cannot recover for himself, and also for another, in whose process he had no interest.

The authority of an attorney at law is more extensive in *Pennsylvania*, than in other places; and does not cease with the judgment. The directions to the sheriff of the plaintiff's attorney as to the mode and times of sale under an execution, are binding on the sheriff and a full authority, if obeyed in good faith.

An attorney is not liable, if he acts honestly, and to the best of his ability.

WRIT of error to the Court of Common Pleas of *Fayette* county.

The opinion of the court was delivered by

HUSTON, J.—*William Barton* had obtained a judgment in the Court of Common Pleas of *Fayette* county, against *N. Mitchell*, for eighty dollars, which he assigned to *S. Wolverton*, who issued execution, and for default in executing or returning that execution, this suit was brought and narr. filed, alleging the breach in relation to the execution for the use of *Wolverton*. This suit was to *October*, 1825; the sheriff's bond was dated in *October*, 1820. At *January*, Term, 1827, a motion was made for leave to amend the narr., which was granted. *William Barton* had another suit against *Mitchell*, on which he had a judgment, and had issued execution to the same sheriff. This last judgment was not even alleged in the record to have been assigned to *Wolverton*, nor did it appear that he had any interest in it; the court below was of opinion that this proceeding was all right, and a general verdict was found for the plaintiff.

By the act of assembly, a suit cannot be sustained on the bond or recognizance against the sheriff's sureties, unless the same shall be instituted within five years from the date of the bond. The act says, "whenever the Commonwealth, or any individual or individuals shall be aggrieved by the misconduct of any sheriff, it shall, and may be lawful, as often as the case may require, to institute actions, &c.; and if upon such suit it shall be proved what damage hath been sustained, and a verdict and judgment shall thereupon be given, execution shall issue for so much only as shall be found by the verdict and judgment with costs: which suit may be instituted, and the like proceedings had, as often as damage shall be so as aforesaid ascertained."

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By the old law a suit was brought in the name of the commonwealth only, and when judgment was entered for the whole penalty, a *scire facias* on it issued for the use of any person aggrieved. Under this law, each individual must sue on the bond or recognizance, to recover for his own damage: no two, not parties to the original suit; or not claiming under the parties to the original suit can join; much less can a suit originally brought by and for one only, be sued for another, or an indefinite number of other persons; especially, if by such proceeding, it is attempted to make the bail liable, contrary to the law limiting their responsibility to suits instituted within five years.

In the suit as instituted, *William Barton* had no interest, was not liable for costs, could not release it; it was *Wolverton's* action for his benefit, it cannot be used to recover damages for *Wolverton*, and also for *Barton*, or for any other person than *Wolverton*, or some person claiming under, or through him; much less can it be used to make the bail liable, when by law they were discharged.

There was also a bill of exceptions to testimony; at a sale made by the sheriff, he struck down an article of property to Mr. *Flinn*. Mr. *Bouvier*, the attorney of the plaintiff, and who issued the execution, came and requested *Flinn* to give up his purchase, and to permit the property to be returned to a Mr. *Long*, which was agreed to, and so done. *Bouvier* then agreed to take *Long* for the price of the article so returned to him, and discharged the sheriff so far. This was offered to be proved by Mr. *Flinn*; the testimony was objected to, and not admitted.

In *Pennsylvania* the professions of attorney, and counsellor at law, are not distinct, the same person conducts the cause in all its stages, and it has not been considered that his authority ceases, when judgment is obtained; a power of attorney is never given or filed, unless demanded by the other party, which does not happen in one case of fifty thousand, and then if procured after demand, it is sufficient; the attorney is in some degree the agent as well as lawyer of the plaintiff; when execution has issued, he often gives time to the defendant, and directs the sheriff to postpone a sale advertised; and so far as I know, this has always been taken as a justification to the sheriff for not selling. Such discretionary powers are necessary for the plaintiff's interest: without the exercise of them, many times, and under many circumstances, property, sufficient to pay the debt, would not sell for enough to pay the costs. Although extensive authority has been exercised by the attorneys, we have had few cases of complaint, and the court has seldom been called on to state the limits of their authority, or of their responsibility to their clients; a circumstance highly honourable to the profession. To look into the practice of other countries or other states, and apply the rules adopted in other circumstances and in consequence of different customs, would not, probably, pro-

(Linch and others, Sureties of the Sheriff, v. The Commonwealth, for the use of Barton, for the use of I. Wolverton.)

duce a result agreeable to the principles of law or justice. If a plaintiff wishes his attorney to have less power than is usually exercised, it would seem more consonant to right, to give him in writing a special and limited authority, than to bring in the law of another country, and say, in opposition to constant and general understanding, that the power of his attorney is to be judged of by that law. As between the client and the attorney, I would, however, say the responsibility of the latter is as great and as strict here, as in any country; I mean where want of good faith, or attention to the cause is alleged; but in the exercise of the discretionary power usually exercised, I would not hold an attorney liable where he acted honestly, and in a way he thought was for the interest of his client.

In the present case, if the attorney had told the sheriff to abstain from selling, he would have obeyed, must have obeyed. If the attorney had bid for the property and bought it, the attorney's receipt would have been good. If *Long* had paid him for this article, and he had paid the money to the attorney, his receipt would discharge the sheriff. In short, the constant usage of the country justified the sheriff in the cause he took; the constant usage and practice informed the plaintiff that attorneys exercised such power: the evidence then ought to have been received.

If any attorney shall be guilty of unfair management, if any sheriff shall know or suspect, much more shall partake in such management, it must take the fate of all unfairness; and, in the case of officers of the court, I would require the strictest integrity. Here there is no allegation of fraudulent conduct or intention in the sheriff. The evidence ought to have gone to the jury.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 28, 1827.]

**DAWSON and SPRINGER against EWING, Administrator of
SIMS.**

IN ERROR.

In a suit for the purchase money of land sold by an administrator, under an order of the Orphans' Court, where the title is fully set out in the petition of the administrator, the purchaser cannot set up a defect of title as a defence.

It is no objection to the administrator's recovery of the purchase money, that he had not given security in the Orphans' Court.

Where two purchase together, a tender of a deed by the vendor to one of them, is sufficient.

The want of an averment of tender of the deed in the declaration, in a suit for the purchase money of land, is cured by the verdict.

THIS was a writ of error to the Court of Common Pleas of *Fayette* county.

The opinion of the court was delivered by

ROGERS, J.—*Nathaniel Ewing*, administrator of *John Sims*, deceased, obtained an order of the Orphans' Court of *Fayette* county, for the sale of the real estate of the intestate, for the payment of debts, and maintenance, and education of minor children. *Zudock Springer* and *John Dawson* became the purchasers of No. 7, part of the real estate for three hundred and forty dollars; and the sale by the administrator was confirmed by the court. The property was sold on a credit of nine months, and the terms having expired, and the money unpaid, this suit was brought to recover the purchase money.

The defendants offered in evidence a deed and patent to *Christian Weiseman*, in order to show a defect of the title; and the evidence being rejected by the court, it is now assigned for error. The property sold was purchased at a commissioners' sale, and held by a treasurer's deed, dated 2d of *March*, 1811. Of the nature of the estate and title, the defendants were fully apprized; for a full description of the property is contained in the petition of the administrator to the Orphans' Court. The defendants suffered the sale to be confirmed without any objection, and went into possession of the land. It would be inequitable and unjust to permit them now to allege a defect in the title derived from the commissioners, the risks of which they well knew, and which were doubtless duly considered by them in the price bid for the land. The administrator did not, nor was he bound to warrant the title. Nor was there any concealment on his part, but on the contrary, the notice of the estate was put on the record, and formed part of the muniments of the defendants' title.

(Dawson and Springer, v. Ewing, Administrator of Sims.)

The plaintiffs in error contend, that the court erred in charging the jury that the plaintiff could recover, although the administrator had given no security in the Orphans' Court.

By the act of the 20th of *March*, 1808, when the Orphans' Court of any county may decree a sale of intestate's real estate, the court are authorized to require and take sufficient security from the administrators, conditioned for the faithful execution of the power committed to them in making such sale, and truly to account for and pay over the proceeds thereof, in such manner as the court shall legally decree.

The act authorizes the Orphans' court to require security from the administrator, a power which the court did not possess before its passage. It is discretionary, and not imperative, and cases may arise, although they are rare, which would justify the court in permitting a sale without exacting any security for the faithful performance of the trust. When security is omitted, the purchaser has no right to complain; his title is not affected, nor is he bound to look to the application of the purchase money. It is a matter between the administrator and the creditors, and legal representatives of the estate, with which he has no concern.

It is also alleged there was error in charging the jury, that the tender of a deed to *John Dawson* was sufficient.

It is properly admitted, that if *Dawson* had accepted the deed, *Springer* would have been bound by it, for the reason, that having embarked in the same bottom, and *quoad hoc*, in the nature of partners, the act of one, as respects the particular transaction, binds the other. If then the acceptance of one would bind the other, it is difficult to perceive why the tender to one does not produce the same effect. As a payment to, and a release by one of several obligees, binds the whole, it follows that a tender to one is a sufficient tender to all. 2 *Sid.* 41. *Cro. E.* 625. This principle does not merely rest upon analogy, but has the benefit of a judicial decision by a court of high authority. The point came before, and was expressly decided in *Warder v. Arell*, 2 *Wash. R.* 298, 300. The inconvenience which would result from requiring the tender to be made to all of several purchasers, is a strong reason for concurring in the correctness of the decision.

We have no doubt that the want of an averment in the declaration of a tender of the deed, was cured by verdict. Although not averred, the tender was proved, and I am not disposed to reverse judgments on exceptions merely technical.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 28, 1827.]

FLICK and another *against* BOUCHER.

IN ERROR.

If, on an appeal from the judgment of a justice of the peace in favour of the plaintiff, the case is arbitrated, and an award is made in favour of the plaintiff for the same sum, on which an appeal takes place, and, on the trial, the plaintiff is nonsuited, the defendant having given no evidence, the defendant is entitled to costs.

On a writ of error to the Court of Common Pleas of *Somerset* county, it appeared, that *Jacob Flick* and *John Mason*, the plaintiffs in error, sued *Polly Boucher*, the defendant in error, in trover, before a justice of the peace of that county, who gave judgment for the plaintiffs for ten dollars damages, and costs of suit, to be released on delivery of the note, and payment of costs. The defendant appealed, and the plaintiffs arbitrated the case in the Court of Common Pleas, and obtained an award in their favour for ten dollars, with costs. The defendant appealed again, and issue being joined on *non-assumpsit*, infancy, and payment with leave, the plaintiffs suffered a nonsuit on the trial, no evidence being given by the defendant. The plaintiffs moved the court to enter the judgment for the defendant without costs, which the court refused to do.

Todd, for the plaintiffs in error.—The recognizance before the justice does not follow the proceedings through all the succeeding stages, 12 *Serg. & Rawle*, 24: the subsequent recognizance entered into before the arbitrators supplies its place, after the proceedings have gone that far. Suppose judgment before a justice for fifty dollars; judgment of arbitrators for sixty, and verdict for fifty-five, how can the provisions of the two acts be rendered consistent? The matter must be referred to the appeal from the arbitrators, and be determined by the provisions of the arbitration law; and it is clear by that, that the party reverses the judgment at his own costs. *Shaeffer v. Landes*, 4 *Serg. & Rawle*, 196. In such case no costs are given on the appeal.

Kennedy, contra.—There is no analogy between the two laws. It was not intended that the second recognizance should be an *exoneretur* of the first. By a *reversal*, the defendant, according to the first, is to recover costs; on the second, the amount is only to be abated. The recognizance before the justice has reference to the judgment of the Court of Common Pleas. The costs of the arbitration may depend on rules peculiar to itself. But the costs in court, are to depend on the provisions of the act giving jurisdiction to the justice.

Forward, in reply.

(Flick and another v. Boucher.)

The opinion of the court was delivered by

GIBSON, C. J.—The costs of an appeal from the award of arbitrators are regulated by the arbitration act only; in which it is provided, that the defendant, when he is the appellant, shall give security to pay the costs, on condition that the plaintiff “shall obtain a judgment for a sum equal to, or greater than the report of the arbitrators:” but no provision is made for costs where the plaintiff shall not obtain such a judgment. Hence, in *Shaeffer v. Landes*, (4 *Serg. & Rawle*, 196,) it was held the plaintiff shall not recover costs, because the defendant has not forfeited his recognizance; and the defendant shall not recover costs, because there is no law which gives them. The case of a successful appeal from the award of arbitrators is not provided for, and the court could not give costs to either. How stands the case of a successful appeal from the judgment of a justice? The arbitration act, and the one hundred dollar act, were undoubtedly intended to be consistent in their provisions respecting appeals; and it is our duty to construe them, where we can, so as to give effect to all the provisions of each. Now, although this cause has been arbitrated in the Court of Common Pleas, and a second time carried by appeal before the court, it must be admitted that the arbitration act contains no provision for the costs. Then, that act being out of the way, what is there to prevent us from applying the provisions of the one hundred dollar act, which are particularly adapted to the case of an appeal from a justice? By these it is declared that on the reversal or abatement of a judgment, the defendant, when he is the appellant, shall recover costs if he has produced to the court and jury no other evidence than what he exhibited before the justice; and, as it is not pretended that the appellant produced new evidence here, she is clearly entitled to costs.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 28, 1827.]

SMITH *against* MEANOR.

IN ERROR.

The landlord's right to distrain at the end of the year, is not affected by an agreement in the lease that he may re-enter, if the rent be unpaid, at a stipulated period after the expiration of the year.

It seems, trover cannot be joined with an action on the act of assembly to recover double damages, for distress and sale, where no rent is in arrear and due.

In such action on the act of assembly, it is sufficient if the writ refers to the act of assembly, though it do not conclude against the form and effect of the act of assembly.

WRIT of error to the Court of Common Pleas of *Washington* county, in which the plaintiff in error was defendant below, and a verdict and judgment passed against him. It was a suit brought by *Samuel Meanor* against *John Smith*, under the proviso contained in the third section of the act of the 21st of *March*, 1772, to recover double damages for a distress and sale, where, it was alleged, no rent was in arrear and due. It appeared by articles of agreement, that the plaintiff rented a farm from Judge REDICK for seven years from the 1st of *April*, 1822, at the annual rent of fifty-six dollars. Before the expiration of the first year, the plaintiff gave notice that he relinquished the farm and would leave the premises. He did so, leaving grain, &c., on the premises which Judge REDICK, by warrant directed to the defendant, who was a constable, distrained and sold in satisfaction of the rent. The plaintiff asserted that the rent was not payable, at the time of the distress made. The article on this subject was as follows:

“Article of agreement made and concluded this 13th day of *September*, 1822, between *John Redick* of *Beaver* county, &c., and *Samuel Meanor* of, &c., witnesseth, that for and in consideration of the sum of fifty-six dollars for each and every year, he the said *Redick* hath let to farm unto the said *Meanor*, that tract or parcel of land whereon *J. Wilson* now resides, for and during the term of seven years, to commence on the 1st day of *April* next, bounded by lands of *E. Crawford*; during which term of seven years, in addition to the above rent, the said *Meanor* agrees to pay all the public taxes, and clear as much adjoining a small patch now clear on the west side of the road, leading to *Hunter's* mill as will amount (including said patch) to seven acres, and all the land the said *Meanor* chooses to clear on the right bank of the spring run, leading down from the house towards *E. Crawford's*, not to exceed fifteen acres. It is agreed he shall have the benefit thereof during four years from the commencement of this lease, as well as that on the west of the road including the patch above

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mentioned; and for the balance of the seven years, he, the said *Meanor*, agrees to pay the said *Redick* at the rate of one dollar per acre, so cleared and fenced, and moreover, to put a good shingled roof on the said house or cabin, wherein the said *Wilson* now resides. It is, moreover, agreed by the parties, that if the said *Meanor* shall make default in paying the stipulated rent for three months beyond the 1st day of *April* in each year, that in that case it shall and may be lawful for said *Redick*, his heirs or assigns to re-enter, and dispossess the said tenant, and re-possess the said premises; unless for the first year; it is agreed he shall have six months to pay up after the expiration of the first year, but three only thereafter. It is further agreed, that the said *Meanor* shall not sell his lease without the consent of his landlord; and it is further agreed, that at the end of the term which will be in 1829, he shall deliver up peaceable possession of the premises, leaving the whole in good order."

The court below charged the jury that the rent was not in arrear and due, and that the plaintiff was entitled to recover. The defendant excepted to this charge.

The declaration contained three counts. The first and second, complained of an unlawful distress by colour of law: the third was in trover.

Ross, for the plaintiff in error.

1. Notwithstanding the agreement to dispossess the tenant, if the rent were not paid in three months after it was due, the landlord could distrain as soon as the rent was due.

2. Trover cannot be joined with the other counts. In the latter double damages are recoverable, and therefore the same judgment cannot be given on both.

3. The writ must conclude against the form and effect of the act of assembly. 6 *Serg. & Rawle*, 286. *Reese v. Emerick*. This is omitted here.

Kennedy, contra.

1. The reasonable construction is, that the rent was not to be due before the period of re-entry. On the second point he cited, 16 *Johns.* 147. 3 *Wils.* 348. 2 *Saund.* 187, note. 2 *Burr.* 1114. 1 *Chitt. Pl.* 198, 206.

The opinion of the court was delivered by

DUNCAN, J.—Whether an action of trover can be joined with an action founded on the act of assembly for distraining for rent, where there is no rent due or in arrear, and which gives double the value of the goods distrained in damages, is a question raised on this record. Although the two first counts do not conclude against the form of the act, they refer to the act; and it sufficiently appears they are counts on that act, statutory actions, on which, if the tenant recovers, he is to have judgment for double the value of the goods.

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It seems to be a rule, that two causes of action may be joined where the process is the same, the plea the same, and the judgment the same. It may be true, that the consideration is, whether the actions are of the same nature; there they may be joined; as, if the foundation of the action is tort, any other tort may be joined: but trespass *vi et armis* and trespass on the case cannot be joined, because the actions are of a different species. So actions of contract may be joined where the foundation of the action is a contract of the same species—both simple contracts. But it seems to me a principle, that an action on a statute to enforce a penalty for a transgression, cannot be coupled with a demand for the recovery of damages for a mere conversion of the goods of another. They are *diverso intuitu*. Mere recompense is generally the measure of damages in the one case; the infliction of a prescribed penalty, double the damages sustained, in the other. If the plaintiff had brought an action of trover, and judgment had been for the defendant, that could not have been pleaded in bar of the action for the penalty; the object of the suit would be very different: the same evidence would not support both actions. Trover is an equitable action: this cannot be said of an action for a penalty. In trover, the plaintiff receives only an indemnity: in an action on the statute he is doubly indemnified. The true value of property, and compensation from the time of the demand, is the measure of damages: consequential or exemplary damages are never given in trover, unless in very extraordinary cases, as family pictures or plate; on the statute exemplary damages must be given. The jury can exercise no latitude. A count in trover cannot be joined with a special action on the case for fraud. If a statute gives a remedy in the affirmative for a matter actionable at common law, the party may sue at common law, and waive his remedy by statute. 2 *Inst.* 200. 4 *Burr.* 335. This clearly shows that a party cannot join the two different remedies in the same action. He may make his election, but cannot sue separately on each remedy, or join them in the same action.

Case for taking the distress would lie at the common law, with which trover might be joined, because there the judgment would be the same; but the verdict, in an action on the statute and trover would be different. The double damages are in the nature of a penalty imposed by the act on the wrongdoer. The jury find the value of the goods. This is doubled by the judgment of the court. Double damages is the judgment in an action on the statute; single damages in the action of trover. Whether double damages were actually given, is not matter of inquiry now; they might have been given, they necessarily were given. On these counts, from the charge, we must infer the judgment was for the penalty on the act. The court instructed the jury, that the case was within the penalty of the act; therefore, in this case, there is a misjoinder of

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action: but, on the merits, the judgment must be reversed. The stipulation, as to protracted time after the rent became due, relates only to the right of re-entry, and forfeiture of the lease. It is a distinct and independent covenant, introduced for the benefit of the landlord. The rent became due and was in arrear at the end of the year: the landlord insists that there shall be a covenant enabling him to re-enter for non-payment; to which the tenant assents, on this condition—that there shall be no entry or forfeiture, provided he pays up within six months after the expiration of the first year, and eight months, in the subsequent years; the re-entry and forfeiture could not be enforced, but according to the terms of this stipulation. The payment of the rent, and the landlord's remedy by distress, is not affected by this. He has two remedies: one to proceed immediately as the rent becomes due, by action or distress; the other by re-entry for the forfeiture, at the end of three months, in the first year, and six months in the subsequent years. These are cumulative rights and remedies. The right of re-entry does not take away the right of distress: the landlord may take either one or the other. If he distrains, he waives the forfeiture. If the tenant pays up within three or six months, the tenant saves the forfeiture; but he is not absolved from payment of the rent as it becomes due: that moment the right of the landlord attaches, and he must take either the one course or the other. A Court of Chancery would relieve from the forfeiture, after the end of six months, on payment of the rent, except where the landlord recovers in ejectment for the forfeiture; but chancery would not interfere with the landlord's right of distress. On both grounds, judgment is reversed: a *venire facias de novo* is not awarded, because the plaintiff never could maintain this action, and it would be useless to grant a new trial.

Judgment reversed.

[PITTSBURG, SEPTEMBER, 1827.]

WALKER and others *against* WALKER and others.

IN ERROR.

The plaintiff cannot, by joining in one ejectment two defendants who hold by separate titles, read in evidence depositions taken in a former suit, in which one only of these defendants was party; especially if the land in controversy in the different suits is not the same.

The heirs of a vendor are, generally speaking, bound to convey land sold by the ancestor, and paid for; but an improvement right rests on peculiar principles; it may have been abandoned by the vendee, or the lines left unsettled, and after a lapse of thirty years or more, the heirs would not be liable to the vendee.

Notice of title by one out of possession, to the person in possession, does not prevent the running of the statute of limitations.

The statute of limitations does not apply in cases of express trust, where the right of the *cestui que trust* and trustee makes but one title; but it applies even there, if the trustee openly denies the right of the *cestui que trust*, and it always applies to cases of implied or constructive trusts.

WRIT of error to the Court of Common Pleas of *Allegheny* county.

The opinion of the court was delivered by

HUSTON, J.—The defendants in error, who were plaintiffs below, claimed in right of their wives, who were daughters of *James* and *Mary Stewart*, the lands in question situate on *Robinson's* run.

The whole case presents a mass of strange, incoherent and contradictory testimony, to which it would not be easy to find a parallel in judicial history. The foundation of the plaintiffs' claim, is an improvement. *Dinsmore* states a bill of sale of an improvement to have been made by *Gabriel Walker*, to his sister *Rebecca Walker*, previous to 1776; that this bill warranted the claim of right to her, the lords of the soil only excepted; the witness married *Rebecca Walker* in 1776. He does not say, whether he continued or took care of the improvement; says he sold it to *James Stewart* in 1780, who had married his wife's sister, who lived part of a year on it, and went over the mountains, and never returned. It is agreed by all the witnesses, his widow and children returned in 1795. *Dinsmore* says it was to contain three hundred acres, or perhaps two hundred and fifty, and the price was to vary according as he got the one or the other quantity. He does not state who made the improvement or when made, or on whom it adjoined, or where it was, further than that it was on the waters of *Robinson's* run; he does not state what had become of the bill of sale, which was not produced, nor from all I can find, asked for; nor does he tell whether he sold to *Stewart* by parol or by deed. Two other of the plaintiffs' witnesses say *James Stewart* got the land from *Gabriel Walker*, for his wife's share of her father's estate. and do not mention *Dinsmore*. Two of plaintiffs' witnesses

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ses say, *Gabriel* bought the improvement from one *M^cMinnow*, and paid him and his widow for it. Vague and incoherent as this testimony is, it was all objected to on another ground, perhaps though the objection appears to be general, which I now proceed to state. The heirs of *Gabriel Walker*, who had died in 1800, and who, it seems had originally held also by improvement, and whose lines were alleged not to be definitively fixed, brought an ejectment, No. 56, of *April*, 1809, against Mrs. *Stewart*, alleging she had in her possession some lands belonging to them. *Isaac Walker*, the brother of *Gabriel*, was no party to that suit. Mrs. *Stewart*, in pursuance of a rule of court, took the depositions of sundry witnesses in that cause on the 28th of *September*, 1809. That cause was ended, and afterwards, viz.: at *August* term, 1813, Mrs. *Stewart*, being dead, her children instituted this suit against the children of *Gabriel Walker*, and of *Isaac Walker*. The lands claimed, are part of what was the estate of *Gabriel Walker*, and part of what was the estate of *Isaac Walker*, whose son is one of the defendants in this suit. As *Isaac* was no party to the former suit, and no part of his land in contest, it is clear those depositions are not evidence to affect him or his descendants. I presume it was alleged, that being evidence against *Gabriel's* heirs, who were joined with *Isaac's* heirs in this suit, they could be read against both. The plaintiffs need not have joined the heirs of *Isaac* and *Gabriel* in this suit, their possession and titles appear to be separate and distinct, and the plaintiff by joining *Isaac's* son with *Gabriel's*, shall not read against young *Isaac*, depositions taken in a cause in which neither he nor his father had any interest; to which they were not parties, and of which they had no notice, nor no opportunity to cross-examine. But were those depositions evidence against *James Walker* (the son of *Gabriel*) and his tenant *Johnston*? That depositions taken in a former cause, may be read in a subsequent cause, the latter cause must be between the same parties, or those claiming under the same parties, and the matter in issue must be the same, or at least part of the same property. I confine myself to questions of property, and not abstract rights. What are the facts here?—Mrs. *Stewart* claimed land by improvement of which she was in possession, her claim was not defined by lines; the depositions were taken the 28th of *September*, 1809, her survey which included her then possession, and took in thirty or forty acres, cleared and occupied by *James*, was not made until *March*, 1810. That suit was to determine the right to lands then, and long before occupied by Mrs. *Stewart*; this suit is to determine the right to land, actually cultivated by *James Walker*, by his father, and by *Boyd* from about 1783; the land now in controversy is not the same, nor is any part of it the same. *Walker* had no notice that this suit would ever be brought, his right to this land be contested, no notice to cross-examine as to what is now in contest. If Mrs. *Stewart's* claims had then been

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defined, if she had at that time even an ex-official survey, or any other definite designation of boundary, which showed her claim to extend into the actual possession and occupancy of *James Walker*, it would present a different question; but this was not the case: the proof is clear, and uncontradicted, that she had no survey at the time the depositions were taken, and more than that, she did not, at that time, claim the land now in dispute: this suit, she herself said, arose on her success in the former. Those depositions then, are not evidence in this cause. The witnesses are now all dead, but that does not make the papers evidence, though in some cases it may strengthen an alleged waiver of formal objections. There is not, however, much room for regret even to the plaintiffs, as much of the contents of those depositions, was never legal evidence in any cause; for example, the declarations of *Isaac*, not in the presence of his brother, make the strongest part of the evidence against that brother. These declarations were never evidence, if objected to by *James*; and are not evidence against *Isaac's* son, because not sworn to in this cause, or in any cause where he could cross-examine.

I pass over a great part of the testimony, or, as the judge calls it, the conversation of *John M'Michael* with the counsel, and, also, of *William Stewart*, with the remark, that much of what each of them related, are conversations with the plaintiffs, or with persons not parties, and no little of it hearsay.

John M'Michael, however, proves that on the 8th of *March*, 1810, he made the survey for Mrs. *Stewart*, by which the plaintiffs claim; that no notice was given to any of the *Walkers*; that *Gabriel Walker* settled in 1793 or 1794, and his improvements continued ever since; that he took part of the land cleared by *Gabriel*, into *Stewart's* survey; that *Boyd* had settled about 1783, and had sold to *James Walker*; all his claim, including about forty acres cleared, was taken into the survey; that Mrs. *Stewart* did not want to take in this, but did it on the suggestion of the witness; that *Gabriel Walker* had said her line would come there—by the bye, he does not say he ever heard *Gabriel* say so, nor whether he said so while owner of the land or after he had sold to *Boyd*: he further says he took into that survey twenty or thirty acres of land, cleared by *Isaac*, together with a house and still-house.

It also appeared, *Isaac* had a warrant and survey in 1785, and that *Gabriel* had a survey about 1785, the lines of which were well known; and, although the draft was lost, yet when the deputy surveyor re-surveyed, in 1817, he followed the old lines, and made no new marks. *Boyd's* fifty acres were within this survey.

It also appeared, that *Isaac Walker* being dead, his son *Isaac* took his land at the appraisalment under an order of the Orphans' Court. Also, that *Gabriel*, being dead, his son *James*, in 1805, purchased *Boyd's* fifty acres, at eight dollars per acre. It further

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appears, that *M^cMichael* took into his survey, and now holds the ground on which *Branner's* cabin stood, and the land he had cleared, and which *J. Stewart* once occupied, but how much of the land originally claimed by *Stewart*, he holds, does not appear. *M^cMichael* says that he, at the instance of *Gabriel Walker*, left part of what he intended to have taken, for *Stewart*.

It is also sworn that *Thornburgh*, in another quarter, took in forty or fifty acres of what Mrs. *Stewart* claimed, and that she had attempted after she came out, to repossess herself of what both *M^cMichael* and *Thornburgh* had occupied, but without success.

I shall not follow the case through a long charge of the court before whom it was tried. Certain propositions were stated by the counsel for the plaintiffs and defendants. The plaintiffs requested the court to direct the jury,

First, if the jury believe that *Gabriel Walker* sold his land, his heirs are bound to convey it.

The court did not assent to the proposition as applicable to this case, and they were right. Generally where a man sells land, and payment is made to him or his heirs, the heirs must convey it if their ancestors did not: but there are many exceptions. An improvement right differs from most other rights, and particularly in this; it may be perfectly good when sold, yet, if the purchaser suffers others to settle within it, or to survey in parts of it, and makes no objection, such settlements or surveys may take away parts of the land, and the vendor or his heirs be in no respect responsible. The purchaser may desert and abandon his improvement so completely, that it may become open to be appropriated by any person as vacant land, and thus lost entirely, and the vendor or his heirs be in no respect answerable; what was a good and valid title, being wholly or partly lost, not from original defect of right, but by the subsequent negligence or abandonment of the purchaser. A property may be sold, the boundaries of which are undefined. If those who adjoin it, among whom is the vendor, are suffered to define and limit their own rights, and do so, and no objection made for thirty or more years, it is believed no court of equity ever decreed a specific performance in such case, if by so doing it must change boundaries long established; but, if the vendor has sold, and his vendee possessed without interruption; if the vendor has died, and his children divided his estate, or one of them taken at an appraisement, and paid his brothers and sisters for what his father and himself, after his father's death, had occupied thirty years, it would repeal our act of limitation, and overturn all its principles, which secure property and estates, to make such heirs liable to complete in its letter a contract which has been suffered to sleep so long. Here no one witness undertakes to designate the boundaries of what *G. Walker* is said to have sold. If he had a patent for the land, and sold by its lines in 1776—had entered on land within those lines in 1783, and sold part, and occupied other parts as his own,

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his children entered after him, divided or appraised by public inquest of record in our courts, and no claim for thirty years after the entry and occupation of their father, the statute of limitation would protect them; and shall it not against a vague claim which no witness defines, no two witnesses agree as to the nature and description of, and which the present owners never attempted to designate from 1776 till 1810.

Second point.—If *Boyd* had notice of *Stewart's* claim when he settled, his improvement purchase and residence will not protect him, and this is agreed by the court to be the law. He who purchases with notice of an adverse claim, has not all the advantage of a purchaser without notice; but, if he purchased from one who claimed in his own right, and is suffered to continue until he can show twenty-one years' continued possession, the statute of limitations protects him: notice of his title by a person out of possession does not prevent the statute from running in favour of one in possession, and claiming adverse to such title. There was error then in the answer to this point.

Third point.—That the heirs of *Walker* buying from *Boyd*, with notice of *Stewart's* claim, hold as trustees. Where the counsel found any thing on which to found the second, and this third proposition, I cannot discover. It was said *G. Walker* covenanted to make *Boyd* a title founded on patent, and having neglected to do so, *Boyd*, in 1799, took a bond and security, that his title should be made according to the covenant, and *John M'Michael* says, *Boyd*, while living on the said land, said he was afraid of contention, and would sell; but that Mrs. *Stewart* ever claimed *Boyd's* land or any part of it, or that he thought she did, is neither said nor surmised by any witness; nay, it is proved by her own witness, that she never did claim the part, once *Boyd's*, up to the survey of the 8th of *March*, 1810, and would not then have included it, but for his, (*M'Michael's*) suggestion. From what I have said, the length of time, extent of improvement, delay of claim, &c., had made an end of all claim on the part of the plaintiffs, on the facts proved. If other and different evidence shall be given, the case may be altered.

The fifth and sixth points apply to the warrant of *Mary Walker*, and the land surveyed on it; or to any warrant which *Gabriel Walker* or *Isaac Walker* could take out for that land. The seventh, is the fifth repeated. Who took out the warrant of *Mary Walker*, is not stated or proved in the case, nor do the counsel agree. It was not in evidence, though much was and is said about it. What land it calls for we do not know: whether *Gabriel's* survey, made before 1780, was on this warrant or without warrant we do not know; we do know it was applied to that old survey, in 1817. I shall then say nothing about it; the answers of the court to these, and to the first of the defendant's proposition, viz., that prior to the entry of *Mary Stewart* in 1795, she had no ti-

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title to the land on which the plaintiff resided, the improvement of *Branner* and *Scott* not giving any title to the land: and the second, that the plaintiffs are bound by the fifth section of the act of limitation, of 1785, which, I understand, is the first repeated in other words, call for some observation; much of the answers of the court are founded on facts contained in the depositions, which cannot be read at next trial. The same, or similar facts may, however, be proved by others.

The fifth section of the act of 1785, has received repeated construction in our courts: the cases are collected in a note in 2 *Smith's Laws*, on this act; the inconvenience and confusion anticipated from bringing up old claims to improvements, struck the legislature so forcibly, that there is in this section no saving for married women, nor for infants. And it has frequently been decided, that unless the claim was not pursued within the five years, it was totally gone for ever. The case of one who surveyed on such a claim before the five years had expired, came before this court in *Magens's Lessee v. Smith*, 4 *Binn.* 73.

It was contended that a survey on land, to which an improved right existed, was totally void; but decided that it was voidable, if the owner of the improvement came and claimed within the period: if no such claim made, the law extinguished the improvement claim, and the warrant and survey became a valid title. Admitting, then, the title of *Stewart* and his heirs to have been good and indefeasible when *Stewart* left the land, his heirs were bound to renew the claim and resume the possession, or take a warrant before the 25th of *March*, 1790, or their title was gone. They did not do so, the land became vacant, and any person might settle on it, or take a warrant for it. It might appear ungracious in *G. Walker* to take part of it, but it was in law as open to his occupancy, as any other vacant land in the state.

But, it is said, both he and *Isaac* took possession, not as claiming for themselves, but as agents and trustees for their sister, and this is the only feasible ground on which the plaintiffs have a shadow of claim. Part of what has been said applies to this part of the case. The doctrine that the statute of limitations does not apply in cases of trust, has been much misunderstood. It only applies in cases of express trust, when the rights of trustee and *cestui que trust* make but one title; where there is a confidence, or was a confidence, between the parties; and even then I will not say it applies where the trustee openly and distinctly denies the right of *cestui que trust*, asserts his claim and title, and holds possession adverse to him with his knowledge, &c. But it never applied to implied trusts; to all those cases, where he who has the legal title denies and disclaims all trusts, claims and acts in all cases and in all respects as sole and exclusive owner: much less does it apply to cases where, along with such occupation and claim, the party has the legal title of record, and the trust is to be made out by old

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hearsays, vague recollections, and forgotten or abandoned claims. "It is a misconstruction of the act of limitations," says the late Chief Justice, "to say, that because a man once stood in the relation of trustee, he must stand so for ever, and lose all benefit from the act of limitations." *Pipher v. Lodge*, 4 Serg. & Rawle, 316. To which case, and the opinion of the present Chief Justice, in the same case, at the end of the volume, I refer for the law on this subject. It is not true that an open, continued, adverse possession will bar a title, perfect both at law and in equity, and the same possession will not bar a vague, uncertain, indefinite claim. If then the facts prove in the defendants, or any of them, an open, notorious, or adverse possession and claim, in their own right, for the space required by the act of limitations, the title of the plaintiffs is extinguished by that act; and each section of it is equally operative and conclusive. The first or the fifth are equally in force, and equally protect the party whose case is within them; and neither of them is to be frittered away and destroyed, by giving a particular name to a claim, or by raising doubts, as to how the rights of the parties once stood.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 18, 1827.]

HOOK *against* HACKNEY.

IN ERROR.

After the plaintiff has had a commission executed, the defendant may send a new commission, to examine the same witnesses on matter not inquired of by the plaintiff's interrogatories.

It seems objections to such commission, should be made before trial.

Words spoken of plaintiff, in the character of the judge, are actionable without colloquium or innuendo.

WRIT of error to the Court of Common Pleas of *Warren* county, in an action of slander brought by *Joseph Hackney*, the defendant in error and plaintiff below, against *Jacob Hook*.

The first count of the declaration stated that whereas the said *Joseph Hackney*, was at the time of the committing of the said several grievances, by the said *Jacob Hook*, hereinafter mentioned, and for a long time hath been one of the associate judges of the county of *Warren* aforesaid, and as such associate judge hath conducted and behaved himself faithfully, honestly and impartially, &c. And, whereas also before the committing of the several grievances by the said *Jacob Hook*, as aforesaid, as is hereinafter mentioned, a certain prosecution had been depending in the Court of Quarter Sessions, of the county aforesaid, before

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the honourable Judge MOORE, and the said *Joseph Hackney*, and the honourable *Isaac Connaly*, his associates at *Warren* in the county aforesaid, against one *Emanuel Crull* and one *John Mead*, for larceny, wherein the said *Jacob Hook* was prosecutor, and the said *Emanuel Crull*, had applied to the said court to be tried separate, and apart from the said *John Mead*, which had been granted by the said court, &c., and the said *Jacob Hook* contriving, &c., to cause it to be suspected and believed by those neighbours and citizens, that he the said *Joseph Hackney* had been and was guilty of perjury, felony, cheating, and fraud, and of the offences and misconduct hereinafter mentioned, to have been charged upon and imputed to the said *Joseph Hackney*, or of some other such offences or misconduct, and to subject him to the pains and penalties by the laws of this commonwealth, made and provided against, and inflicted upon persons guilty of such offences, and thereby to injure the said *Joseph Hackney* in his said office, and to vex, harass, oppress, impoverish, and wholly ruin him the said *Joseph Hackney*, heretofore, to wit, on the 30th day of *August*, in the year of our Lord 1823, to wit, at the county aforesaid, in a certain discourse which he the said *Jacob Hook*, then and there had, in the presence and hearing of divers good and worthy citizens of this commonwealth, he the said *Jacob Hook*, then and there in the presence and hearing of the said last mentioned citizens, falsely and maliciously spoke, and published of and concerning the said *Joseph Hackney*, and of and concerning his office in substance these false, scandalous, malicious, and defamatory words, that is to say, Colonel *Hackney* (the said *Joseph Hackney*, meaning) *has done that for which God will not forgive him; he* (the said *Joseph Hackney* meaning) *has violated his oath; he* (the said *Joseph Hackney* meaning) *has influenced Judge MOORE to decide causes against me unjustly*, (meaning that the said *Joseph Hackney* was corrupt, partial, and influenced by improper motives in the discharge of his official duties, and exercised an undue influence on the honourable Judge MOORE, president of the several courts of *Warren* county, whereby injustice had been done to the said *Jacob Hook*.) *He* (the said *Joseph Hackney* meaning) *was the cause of my losing the suit with Crull*, (meaning that the said *Emanuel Crull*, when prosecuted by the said *Jacob Hook*, as aforesaid, would not have been acquitted, had it not been for the improper and partial conduct and interference of the said *Joseph Hackney*.) *He* (the said *Joseph Hackney* meaning) *is a damned old rascal, and has done that which will remove him from his seat, and I* (the said *Jacob Hook* meaning) *will have him removed*, (meaning that the said *Joseph Hackney*, had behaved so corruptly, partially, and improperly in the discharge of his official duties, that he was liable to be impeached and removed from his said office, for misconduct, and that the said *Jacob Hook* would procure his removal.) *He* (the said *Joseph Hackney* mean-

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ing) robbed Mr. Granger, of his property, (meaning that the said Joseph Hackney, had cheated and defrauded one Eli Granger.) I (the said Jacob Hook, meaning) can prove by the first characters in Pittsburg, that he (the said Joseph Hackney meaning) is one of the damndest rascals that ever came into this county. It is generally reported, that if he (the said Joseph Hackney meaning) had had his deserts, he would have been in the state's prison long ago, (meaning that the said Joseph Hackney was guilty of felony, or some other crime, the punishment due to which is by the laws of this commonwealth imprisonment in the penitentiary.

And afterwards, to wit, on the day and year aforesaid, at the place aforesaid, in a certain other discourse, which the said Jacob Hook then and there had in the presence and hearing of divers other good and worthy citizens of this commonwealth, he the said Jacob Hook further contriving and intending as aforesaid, then and there in the presence of the said last mentioned citizens, falsely and maliciously spoke and published of and concerning the said Joseph Hackney, in substance, these other false, scandalous, malicious and defamatory words following, that is to say, he (meaning the said Joseph Hackney,) has violated his oath, and if he had had his deserts he would have been in the state's prison long ago, (meaning that the said Joseph Hackney has committed perjury, and incurred the penalty due to that offence.) By means of the committing of which, &c.

On the trial, the plaintiff having given evidence of the speaking of the words by the defendant, offered to prove the circumstances of the defendant; to the admission of this evidence the defendant objected, but the court admitted the evidence. To this decision the defendant excepted, and the court sealed a bill of exceptions.

The plaintiff having given in evidence the testimony of Royal Keys, and Abraham Staples, taken on a commission, executed and filed, the defendant offered in evidence the cross-examination of the said Royal Keys and Abraham Staples, on another commission subsequently issued on his motion. There being no objection on the score of copy, and notice of the said commission and interrogatories. To this evidence the plaintiff objected, and the court sustained the objection, and overruled the evidence; to which decision the defendant excepted, and the court sealed another bill.

The defendant offered in evidence the testimony of Henry Dunn, that what the defendant said during a conversation relative to the plaintiff, was true, to wit, that the plaintiff had bought a lot of Eli Granger, and had sold it at an advanced price: to the admission of which evidence the plaintiff objected, and the court sustained the objection, and overruled the evidence, and sealed a third bill of exceptions.

The court were requested to charge the jury. 1. That none of the words either laid in the declaration, or proved in evidence, were actionable, unless charged on the plaintiff in the execution of

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his office as a judge; and this is not to be presumed, it must be proved to the satisfaction of the jury.

2. The words, "that the plaintiff was reported to be the d—dest rascal in *Warren*, and, that if he had his deserts, he would have been in the state's prison long ago," are not in themselves actionable, and can only be made so by relation to the plaintiff in the execution of his office, at the time the words were spoken.

3. The words, "he has done that which God will not forgive," are not actionable.

4. The court are requested to charge the jury, that if the defendant did not intend at the time of speaking the words, to charge the plaintiff with any particular crime or misdemeanor, but that the expressions were merely words of general abuse, the plaintiff is not entitled to recover.

Answer of the court to the first, second, and fourth points.—The declaration charges the words to have been spoken of the plaintiff as a judge. And the witnesses speak of the words used by *Hook*, in relation in part to his official station—particularly *Keys*, who says that *Hook* used the words, "old judge *Hackney*." Thereupon the court do not answer as requested.

Third point.—Is so, if spoken alone without other words.

Galbraith and *Selden*, for the plaintiff in error.

1. There could be no objection to the commission to cross-examine, and the evidence being proper in its nature, it ought to have been received.

2. The words proved were not actionable, unless laid and proved in relation to the official character of the plaintiff.

Pearson and *Banks*, contra.

There is no such thing as a commission to cross-examine. The party may take a new commission, or he might have filed cross-interrogatories.

The opinion of the court was delivered by

DUNCAN, J.—The plaintiff in error, who was defendant below, withdrew his motion in arrest of judgment; and in the specification of error, has not assigned for error, that one of the counts in the declaration does not contain actionable words, and the verdict and judgment being general, it would be error. The court is not called upon to decide that point; but it will be well for the defendant in error to consider this before he goes to a new trial.

The first count in the declaration is, for words spoken of the plaintiff in his character, and of him as an associate judge of the Court of Common Pleas. The words laid in the declaration, are, "Colonel *Hackney* has done that for which God will not forgive him—he has violated his oath—he has influenced judge *MOORE* to decide causes against me very unjustly. He was the cause of my losing the suit with *Crull*. He is a damned old rascal, and has done that which will remove him from his seat." The

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charge is, that he has used undue influence—has violated his oath—for which he ought to be removed from his office—his seat—certainly his seat on the bench—his judicial seat. These words substantially were proved; the verdict finds the defendant spoke the words as laid: if so, they could not be spoken of the plaintiff in any other character than that of judge. The defendant has no reason to complain of the charge of the court. His question was not very distinctly put. The answer of the court, fairly construed with relation to the whole subject, and the evidence is, if the words as laid in the declaration, were uttered by the defendant, then this was spoken of him in the character of judge; and to be sure if they were uttered, the court would have been right in saying, that *ex vi termini*, they did import impure official conduct, which the defendant said would be sufficient to remove him from his seat. The words required no colloquium, no innuendo to make them actionable. I am, therefore, of opinion there is no error in this.

But in the rejection of the evidence taken on the second commission, I think there was error. The commission was granted on motion in court, notice was given of it, and copy of interrogatories duly served on the plaintiff. The commission is returned, and it is not until the defendant offered it in evidence, it is objected to. If there lay this objection to the commission, it should have been made at an earlier period in the cause, or an opportunity given to the defendant to have a new commission; but the objection I think, is rather hypercritical; that it was not a commission to examine the witness *de novo*, but merely a cross-examination. This might have been informal: but look at the state in which the defendant stood? The plaintiff had executed a commission on interrogatories. The answer of the witnesses (cross-examined on the defendant's commission,) was an answer to the interrogatories calling on the witnesses to answer, whether the defendant had uttered any words derogatory to the plaintiff's character as a citizen and neighbour, not as a judge, or in his official character. Therefore, the defendant could not put cross interrogatories of a matter which the witness was not interrogated on by the plaintiff whose witness he was: he had no opportunity to cross-examine him on a matter not inquired of on the first commission. Substantially this was a second commission to examine the witnesses; and if this matter had been so stated to the court, the second commission would have been properly rejected; but terming it a commission to cross-examine, would not vitiate it, and could not be taken advantage of on the trial of the cause.

I am, therefore, of opinion that the evidence was improperly rejected, and that the judgment should be reversed for that reason.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 23, 1827.]

COMMONWEALTH *against* M'DONALD.

At the *August* Term of the Circuit Court for the county of *Allegheny*, a case involving facts and principles of much importance to the city of *Pittsburg*, and the public was tried. It was an indictment against the defendant for a nuisance, in obstructing one of the principal streets, (*Water* Street,) by a brick ferry house, a stable, and a stone wharf, situated at and near the west side of *Liberty* Street. On the trial, it was satisfactorily proved that *Water* Street was laid out from *Grant* Street, to the junction of the *Allegheny* and *Monongahela* rivers, and extending from the north side of said *Water* Street to the river. It was also proved that it was dedicated to public use, and used by the public as a common highway, from the laying out of the town, until some time between the years 1802 and 1805, and that some time between those years *Water* Street was obstructed by a fence placed across it on the west side of *West* Street. The persons under whom the defendant claimed, had occupied the lots near which the alleged nuisances were erected, as a landing place from a ferry at the opposite side of the river, for about thirty-five years. But none of the encroachments stated in the indictment were erected anterior to 1806. The ground of the defence will be fully understood from the charge of Judge DUNCAN, and his opinion on the motion for a new trial.

Counsel for the commonwealth, *Wilkins*, deputy attorney general, *Craig*, and *Selden*. For defendant, *Baldwin* and *Forward*.

CHARGE OF JUDGE DUNCAN TO THE JURY.

This was an indictment for a nuisance in the city of *Pittsburg*, containing three counts.

1. Continuance of a nuisance—by a porch and brick building on *Water* Street.
2. Continuance of a nuisance by a frame stable.
3. Erecting a stone wall.

We must banish from our minds all consideration of the parties, of inconvenience to the public, if *Water* Street is not found to extend to the point: and on the other hand of the consequence to the interest of the defendant, if it is so found. We are to decide according to the facts and the law, without regard to the parties or their interest.

It is said very valuable property depends on the event of this trial: it certainly involves some important principles, novel at least in *Pennsylvania*; but in the view I take of the subject it depends on one fact for your decision, and is resolvable into a few elementary principles of law.

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The first question is, was this a street laid out as *Water Street* in the plan of *Pittsburg*?

Second, did that street extend to and include the *locus in quo*, the place on which the erections were made?

Third, was there an encroachment made, and continued on this street by the defendant?

Fourth, had he any authority to make it, or continue it?

Fifth, if he had not, does his length of possession protect him from the prosecution?

Let us first dispose of the question raised, as to the right of the *Penns* to lay out a street so as to include this ground. It is alleged, that having agreed to sell the point of land at the confluence of the rivers to *Craig* and *Bayard*, before the town was laid out, they had no right which they could exercise over it. This is a question properly of law, for the decision of the court.

The first agreement was only executory, with no plan agreed on, depending on future sales to be made within a year; it was entered into in *January*, 1784, probably within the contemplation of both parties, that it was to be included in a town about to be laid out.

The town was laid out in *May* following, including this ground in the general plan, and marked as lots 143 and 144, and bounded in the plan by *Water Street*. When this agreement was executed by the conveyance stipulated for, it is by a reference to this plan, and the conveyance of the lots by the designations of No. 143 and 144, in a plan of *George Woods*. In that plan the lots are bounded by *Penn*, by *Liberty*, and *Water Streets*, and not by the river as in the conveyance. The conveyance is by reference to this map or plan, and is of the lots by No. The right of *Craig* and *Bayard*, is to be governed by the conveyance, depends on that, and that alone. It is a surrender and revision of the former agreement, fixing the plan, including other ground by lots according to *Woods'* survey and the town plat. The receipt on the agreement, states that the payment was for the lots that day sold, with a reference to the division and location by *Woods'*, and the conveyance given and accepted, is of the lots described in the plan or map of *Woods'*. *Craig* and *Bayard* could not go beyond this, and set up the agreement; the acceptance ratified the act of the *Penns*, and the division of *Woods* and the town plat. They bought by the map, they paid according to the map, and it was conveyed according to the map. Of this I have no doubt, nor have I any doubt as to the conveyance to them. My opinion is, that the description in the plan is to govern, as if the boundaries were particularly recited.

The rule that known monuments referred to must govern, is not inflexible, where a plan is referred to and the description is not complete, without reference to the plan; the descriptions in the plan are the true boundaries. When a grant is of a *particular*, sufficiently certain by some *circumstance* belonging to it; the *circum-*

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stance mistaken or false, will not frustrate the grant, when particulars are before sufficiently ascertained. 7 *Johns.* 257. 10 *Johns.* 85. 17 *Mass.* 207. Now *Woods'* map is entirely certain, it requires nothing to fix it. The *Monongahela* river is a *mistaken circumstance* in the conveyance. No. 143 and 144, do not join the river, but are bounded by *Water Street*. If the map is not the description, is not the standard of the boundaries, then the grant is void for uncertainty; it is without dimensions and without form. It is the map that gives it a habitation and a name. The conveyance only gave *Bayard* and *Craig*, a right to the lots mentioned in the plan, to *Water Street*. That is one of the boundaries. It is as if all the boundaries had been expressly recited. The proprietaries had a right to include this in the town plat. *Bayard* and *Craig*, by the acceptance of the deed, have ratified the plan, have bought in conformity to the plan, and are estopped from denying it. The defendant then has no shadow of title under the *Penns.* and it either was dedicated to public uses or the right remains in the *Penns.*

What then was the effect, the legal effect of this survey and map of *Woods'*? It was a dedication of the ground to public use; making it a street and public highway. For at the common law, a street built upon a person's own ground, is a dedication of it as a highway, so far as the public has the use of it, 2 *Stra.* 1004; and so far is such a dedication respected by our laws, that by our general road law, *Purdon*, 722, the Court of Quarter Sessions cannot vacate any street, lane, or alley, or highway, within the city of *Philadelphia*, or within any borough, town plat, town or village in this state, which has been laid out by the late proprietaries, or by any other person or persons, and dedicated to public use; thus making the town plat the evidence of the public highways, and putting it beyond the power of the courts to vacate them, and as I take the law to be, they can only be vacated by act of the legislature, or by some local legislature authorized by the general assembly.

What then is the evidence? Does it leave the mind in any reasonable doubt as to the location of the street and its extent, co-extensive with the limits of the town? Defendant admits that a street according to the plan was laid out, called *Water Street*, so far down as *West Street*. Why it should stop there, I can discern no possible reason, nor has any one been assigned; all was open for the *Penns* to make it, it interfered with no man's right. Did they make it? There is just the same evidence of its continuance to the point as of its existence at all.

A plan is produced, signed by the surveyor, proved to be authentic with indorsement showing it to be the document returned by Mr. *Woods* to the *Penns*, which came out of the office, as appears by the indorsement of the agent now deceased. There is another made by *Vickroy*, who made the survey at the time the

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work was done, and corresponding with this, and a third one on parchment, proved to be the one by which all sales were regulated. These papers are the best evidence; what other could be had? This map is the charter which regulates the possession and rights of every man in the city. Disregard this, and the city and her possessions are at sea without any chart to direct, any compass to guide.

Had the family of the *Penns* continued in the government, this plan, as is the case with the town plats of *Sunbury*, *Reading*, *York*, *Easton*, and *Carlisle*, would have been returned to the public office, the office of the surveyor general, and would have been full evidence of the facts against them, and all claims under them, with notice, and all purchasers have notice; for the conveyances refer to this map. But it is corroborated by the only living witness of the fact, by Mr. *Vickroy*, who made the survey, and by the only surviving resident, that *Water Street* was continued along the river from *Grant Street* to the point. You will judge; was the fact so? that *Woods* laid out a street, *Water Street*, and did it extend to the point? These are suggestions for your consideration. I ask again, what other evidence can be adduced in opposition to this? It is urged that this is evidence of all the upper lots, until we come to *West Street*, described in the conveyances bounded by *Water Street*, but you will judge whether the weight of this construction is not destroyed by the conveyance to *Ormsby*, which are bounded by the *Monongahela* river, and these are far above *West Street* in the very centre of the plan. Can it be supposed that this was done by design, and that the *Penns* conveyed to him what they would not have done to others, to the water, because he was a special favourite? This supposition is not reconcilable with the state of the property. They could not after fixing a street, run in upon it to serve any one; and it is unnatural to imagine, it is improbable, that they could have intended to make these two chasms in the street. This perhaps rather goes to show that the scrivener used the term *Monongahela*, and *Water Street* as the same thing; but *Ormsby* bought likewise by number, and if he does not resort to his numbers he has no right.

It is further urged, that there is a street marked in the plan along the river *Allegheny*. Though no such street in fact exists. There is some misapprehension. There is no street; there is a small space very narrow left, but for what purpose it was left the map does not state, and the evidence is, it is not left as a street, certainly is not returned (which is the best evidence) in the map as a street.

It is again urged, and evidence has been given to show that the lot-holders exercised acts of ownership down to the *Monongahela*, and the rights of ferriage on these lots; but these acts of usurpation of the public rights, would not deprive the public of them, nor vest the right in the lot-holders. The erection of build-

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ings, and enclosing the ground was a positive act of ownership; but whether these encroachments on the street, if you find it a street, justify the defendant or protect him from this prosecution, is another question which I will presently consider.

But some evidence is given that the bank was used as a public thoroughfare, and the town claimed in 1802, by the street regulators as a water street and public ground, as appears from Mr. *Daragh's* evidence. In 1804, in the act supplemental to the act incorporating the borough, the legislature recognize this right. I do not say, that if the defendant had a right to the ground as a vested estate, that the legislature could divest it, but it is a legislative construction entitled to respect, and was a notice which all purchasers were bound to take. But all had notice. The conveyances gave the notice, and the original deed from the *Penns*, and all the derivative titles, recognize this map. Of the constitutional power of the legislature to regulate the public ground, I cannot doubt. There can be no prescription; it would be prescription run mad, to prescribe a vacating act when the last act on the subject recognizes the street.

In an action for a nuisance, the time by analogy to the statute of limitation would form a bar, but on an indictment for this encroachment the statute does not run, no length of time protects. This doctrine in first and second *Chitty*, 132, and 10 *Mass.*, is not new doctrine, that coloured possession of public rights does not destroy it, the right must be put an end to by some valid authority; some legislative act or borough ordinance, authorized by law. That is not pretended, any one may pull down and destroy a common nuisance, as a new gate, or even a new house erected in a highway: by a new house is meant one within memory. Here is all within memory, the dedication of the road when there was no obstructing house; but when a building has continued time out of mind, it is contended that it was at first set up by consent, or a composition with the owner of the land, or the laying out the road. 1 *Hawks*. 694. But the positive evidence is to the contrary of all this. There was no composition with the *Penns*, there could be no agreement at the laying out of the road.

The distinction between public rights and private ones is quite natural. Every man must look to *his* rights; but in the case of public rights, when no individual has a prior right or interest, distinct from his fellows, where he can bring no action for public nuisance, acquiescence, silence goes for nothing. No man wishes in such a case to single out himself, and to be the actor against his neighbour. What is every one's concern, is no one's concern, and therefore it is that length of time is no answer to a public prosecution for a public injury, as it wisely is to a civil action for a civil right. The right to dedicate, to lay out this public highway, was in the *Penns*. They did it, *Craig* and *Bayard* are estopped from denying it, have ratified and hold the title by virtue of that

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very map and description. It is an essential indispensable part of their right. Without it nothing was granted to them.

If the jury find a street laid out including the place, the defendant is guilty; the continuance of a nuisance is the erection of a new nuisance. Defendant had notice—his conveyance, the conveyance under which he claimed gave him notice sufficient to put him upon inquiry, and he cannot pretend ignorance of that very particular, which is the essence of his own title. The boundaries and extent of the street are well ascertained; its length from *Grant Street* along the river *Monongahela*, to the confluence of that river with the *Allegheny* and *Ohio*, its breadth all the space between the line of the lots on *Woods'* map to the *Monongahela*. There is one case decided in *Pennsylvania*, which has a strong bearing upon the general principles I have advanced. It is the Lessee of *Black v. Heppard* and others, in 2 *Yeates*, 331, tried at *Nisi Prius*, before Justices YEATES and SMITH. There a street had been laid out, called *Water Street*, by the owners, on the bank of the *West Branch*, in a town called *Lewisburgh*, but now known as *Derrstown*, who conveyed lot No. 341, bounding it eastward by *Water Street*, together with the free use and privilege of a landing place on the bank of the river, opposite to and of the breadth of the lot No. 341, with the ways, waters, water courses, &c. The ejectment was brought for the intermediate ground between the eastern boundary of lot No. 341, and the low water mark of the river *Susquehanna*, or part thereof. A stone dwelling house had been erected, but the landing in the river was not enclosed or obstructed. It was then held an ejectment did not lie by the owner of 341. He had no right to the soil of the intermediate ground, and the court then decided it on that principle, and every owner of a lot in the town might then have their action for this invasion of the right of landing, as well as the owner of the lot, which would be absurd.

The counsel, in the case, admitted that he could not enclose the intermediate ground opposite the lot, but contended that the building injured the passage from the lot to the landing place; and this right of passage, was all that the plaintiff contended for; but the court decided that as he had no right to the possession, as he could not enclose it, his remedy was by an action on the case, in the nature of assize. This case clearly proves, that the riparian owner, (as he has been called,) has no right but the right of passage; which he cannot enclose. Now, the conveyance in that case was equally strong in favour of the grantee, as in this case; nay, stronger, for it conveyed the water and passage in express terms. This was a decision at *Nisi Prius* only, but before two judges of great experience. The point was resumed, but abandoned by the plaintiff. That case, I know, was warmly contested. I was of the counsel in it; and the attorney general attended from *Philadelphia* to argue it for the plaintiff.

The admission of the evidence objected to, as well as the com-

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petency of all the witnesses who held lots in *Pittsburg*, which I admitted, and reserved the point for further consideration; as likewise the deposition of *John Findley*, rejected. I likewise reserved the points of law stated in the charge, and adjourned the court to the 13th, to give me an opportunity of consulting the other judges, which could be done without inconvenience, before I proceeded to give a decision on the motion for a new trial, and in arrest of judgment.

The opinion of the court was delivered by

DUNCAN, J.—I postponed the decision on a motion for a new trial, to take the opinion of the whole court, in a case in which there could be no appeal under the Circuit Court law; and the defendant's counsel has been heard in support of the motion, in a very full and able argument. The motion in arrest of judgment has been withdrawn.

This is not to be considered as a precedent for the right of defendants, in criminal prosecutions, to an adjournment before judgment, to have the cause heard on motion for a new trial. Such delay would be mischievous, and retard judgments on indictments. It was a matter, at my own suggestion, and for my own satisfaction, where the question was of general concern. It has relieved my mind from uneasiness, in deciding alone in a case of this magnitude, deeply affecting the public interest, as well as the interest of the defendant; lest I should have fallen into error, to which all men are liable, and none more so than myself: an error from which the party could not be relieved. The judges who have heard the argument, with the exception of Judge ROGERS, who dissents in some particulars, which will be hereafter noticed, have assured me that there is no error in the charge, and that they find no cause for granting a new trial.

The great question was one of fact, submitted to the jury, and who have found the fact of dedication, by the owners of the soil, to the public use of the ground by the name of *Water Street*, the *locus in quo*, and that the street, called *Water Street*, from *Grant Street*, extends along the *Monongahela* river to the confluence of that river, with the *Allegheny* and *Ohio*, the breadth and all the space, between the lines in *Woods'* map and the *Monongahela* river.

I am entirely satisfied with the verdict: the evidence was full, satisfactory, and conclusive. It is proper to premise, that this is not a case in which any peculiar right of the city of *Pittsburg* to the ferriages and tolls is in any way involved; any special or particular rights of the citizens passed on in judgment; but merely the right of the public, to use this ground, as a street, road, and highway. It decides the public right, and that alone: nor is it a case of deviations in buildings, or in the location of streets, from the strict lines of the map, made either by accident or for mutual benefit, or alteration of the plan itself, made for mutual accommoda-

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tion, and long acquiesced in by the original owners and the inhabitants. When such a case arises, it will be time enough to decide it. All I will say at present is, that the decision need create no alarm on this score. This is a very different case; for it is a claim of right to obstruct, and an actual obstruction of the whole street. If, then, this is a question of public right, in the event of which, no citizen of *Pittsburg*, and holding lots here, can derive any immediate interest; then *James Ross* was a competent witness. In the case of a public nuisance, no one can support a private action, unless for some special grievance or injury—particular damage, as the obstruction laming himself or horse. *James Ross* had no more interest in the prosecution than any other citizen of the state, of the *United States*, or of the world, because all had equally the right of passage. This has no resemblance to that to which it has been compared; indictment for forcible entry and detainer, where, though the form is a criminal prosecution, it is in the nature of a civil remedy, for the restitution speedily of a possession forcibly taken and detained. The party has there a direct and immediate interest, the restitution of his possession being part of the sentence.

The objection to the charge may be compressed within a narrow compass. The effect of the agreement of *January*, 1784, and the receipt of *August*, 1784, on the conveyance of *December*, 1784. I do not know that I can make the exposition clearer, by any further illustration, than I have expressed it in the charge; but a more particular detail may be expected.

As early as 1784, when *Craig* and *Bayard* entered into a contract with the *Penns*, it is a natural presumption, that it was in the contemplation of the parties to lay out a town at the confluence of these three great rivers. Nature had pointed it out as a most important station. There was then a town there, though not laid out by any regular plan. The agreement was inchoate, executory, and imperfect; the quantity not precisely ascertained; three acres, more or less; the price to depend on future sales to be made within a year. When the spring opened, the *Penns* proceeded to lay out a town: employ the agent, Mr. *Woods*, who, in *May*, 1784, laid out the town, included these three acres in the town plot, run *Water Street* through it, and divided the whole into lots—building lots—designated these lots by numbers; in that plot bounded by *Water Street*, we find lots Nos. 143, 144, and 145. After the town had been laid out, when the plan had been returned to the proprietors, and the purchase money paid, in *August*, 1784, this first agreement was rescinded, and a new contract entered into: the small piece of ground at the confluence of the rivers, containing three acres, more or less, as described in the agreement of *January*, then assumes a new shape and form, and the transaction was that day changed into a sale of thirty-two lots in the town of *Pittsburg*. The said lots are bounded by the rivers *Allegheny* and *Monongahela*, *Marbury*, *Penn*, *Liberty*, and *West Streets*; and are numbered in Mr.

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Woods' plan of *Pittsburg*, Nos. 1, 2, to 17, Nos. 132 to 145, and 260. This was a rescission of the first contract, the substitution of another at a fixed price, the extension of the first, and a sale of lots marked and completely identified by *Woods'* map, leaves nothing in doubt, nothing requiring explanation. A reference to the map, always ascertained by a glance of the eye, the situation and dimensions of the grant. When the conveyance came to be executed, the contract completed, the description is nearly in the words of the receipt of *August*:—

“Thirty-two lots or pieces of ground, situated in a point formed by the junction of the two rivers *Monongahela* and *Allegheny*, in the town of *Pittsburg*, marked by the general plan of the said town, made by Col. *Woods*, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, Nos. 10, 11, 12, 13, 14, 15, 16, 17, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, and 260; and which said plan is recorded, or intended to be recorded, in the office for recording deeds in *Westmoreland* county. The said lots, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, are bounded northwardly by the said *Allegheny* river, eastwardly by *Marbury* Street, southwardly by *Penn* Street, and southwardly by the said *Monongahela* river. The said lots, Nos. 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, are bounded southwardly by the said river *Monongahela*, northwardly by *Penn* Street, eastwardly by *Marbury* Street, and southwardly by *Liberty* Street, and the lot of ground No. 145, bounded southwardly by the said *Monongahela* river, north-westwardly by *Liberty* Street, northwardly by *Front* Street, and southwardly by *West* Street.”

The thirty-two lots conveyed, are the thirty-two lots in the town of *Pittsburg*, marked in the general plan of the said town by Col. *Woods*, by Nos. 1, 2, 3, &c. Common sense would say, it is necessary only to cast your eye upon *Woods'* map, to find out what was bought, and what was sold, and the plan of Col. *Woods* is made, in explicit terms, the land mark. The muniment to be referred to was to be recorded in *Westmoreland*, if it had not already been done. The sale, as strong as words can render any thing, was by the map as certain as if the courses and distances of each number had been particularly set forth in the conveyance. The reference to *Woods'* plan, without any thing else, was a certain description: it clearly ascertained the thing granted. 17 *Mass.* 27. The addition of the *Monongahela* river was mere surplusage: was the addition of a mistaken or false circumstance, and would not frustrate that which was before certain. The surplusage would be rejected. *Jackson v. Clark*, 7 *Johns.* 257. *Jackson v. Looney*, 18 *Johns.* 85. 4 *Mass.* 146. *Dyer*, 376. *Hobart*, 170. If it is not rejected, and the map adhered to, what is conveyed? Not the lots 143, 144, and 145, because they adjoin, not the water, but *Water* Street. They are something very different—different in point of situation, and very different in quantity. The conveyance would be of something more than those numbers in *Woods'*

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map, going out of and beyond those boundaries; something which *Craig* and *Bayard* had not paid for. The map was to be the standard: it was to be recorded in *perpetuam rei memoriam*. The conveyances of the *Penns* were always by the number of the map. The purchaser put his finger on the number he wanted in *Woods'* map; and the description, and, I add; the only certain description, by which all the lots in *Pittsburg* are held, is by a reference to the map, which is the great charter of the rights of all. If *Craig* and *Bayard* did not buy the numbers in the map, then they have no rights, as the grant is without quantity or dimensions.

There is but one rule now in construing conveyances—the intent of the parties. All words give way to the intent. It would be difficult for courts of justice not to construe the reference to numbers in *Woods'* map, as explanatory of the intent of the parties; and, if it were necessary, restrictive of the words, *Monongahela* river. *Gascoyne v. Barker*, 3 *Atk.* 9. The map and the numbers are all part of the same sentence. The sentence was not perfect before, and it conveyed nothing certain, described nothing certain—thirty-two pieces or lots of ground at the confluence of the rivers, bounded by the junction of the river *Allegheny* and *Monongahela*. What thirty-two pieces or lots of ground? Why the thirty-two by their numbers in *Woods'* map.

It is the map which gives the description, and the map was to be recorded as perpetual evidence of the boundaries of the lots. Nothing more was conveyed than the lots as delineated in the map, and designated by the numbers. This conveyance, therefore, does not include the ground; the defendant can have no right to enclose it as appendant or appurtenant to his grant; and there is, in my opinion, no rational ground to say, that sixty feet was dedicated to the public use, and all from that down to the water was included in the numbers granted to *Craig* and *Bayard*.

Nor is there any thing on which to found an argument, that all to the water's edge was granted to *Craig* and *Bayard*, subject to the right of easement of a public highway, sixty feet in breadth, because the grant is limited to the ground contained in the numbers, as designated in *Woods'* plan. The original agreement was extinct, a new one made. It can have no effect in the construction of the conveyance, and that was by the plan just before made; the parties could not have had in view to derange, dislocate, or break in on the plan. They profess to contract in conformity to it, and in conformity to the numbers; they adopt that plan, and regulate their conveyance by it. It is impossible to reconcile the boundary of the river, with the grant by the map. The moment you refer to the plan or plat of the town, which is a certain and complete description of itself, requiring nothing extraneous to designate it, the boundary by the river is lost, the map excludes it; that circumstance is a mistake, and this on every rule of construction is to be disregarded as surplusage. Nos. 143, 144, and 145, convey all

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within certain limits; nothing beyond those limits is granted; the *locus in quo* is not within those limits.

There remains only to be considered the operation of time, as a bar to the prosecution of this public offence. As to the presumption of a grant, from a length of time, this would be a most unwarrantable presumption, a presumption, contrary to all positive evidence in the cause: from whom could this grant be? The *Penns* could not, because they had dedicated it to public use; the city did not; the state did not! All the conveyances from the *Penns* have been produced, it is not pretended that any other deed exists: the recitals in all the mesne conveyances prove this. The deed of 1797, from *Turnbull, Holkar, and Marmie* to *Jones*, is in these words: "Do grant, bargain, and sell the two lots, Nos. 143 and 144, marked in the general plan of the said town, made by Col. *Woods*;" and the sheriff's deed to the defendant is, "of all the right, title, and interest of *James Jones* to parts of lots Nos. 143 and 144, in *Woods'* plan of lots in the city of *Pittsburg*," and; though it designates the lots as extending to the *Monongahela* river, yet it is only a sale of lots Nos. 143 and 144; and *James Jones'* interest in these lots, so that in every conveyance, in every recital down from the proprietors to the defendant, it is of the lots by their numbers. There is no room for presumption; the defendant does not show or pretend that any thing ever was granted by the *Penns*, except in the papers he has produced, the very circumstance of the defendant appearing and showing these papers excludes all presumption of any other grant. *Penn's Lessee v. Kline*, 4 *Dall.* 403. Who was capable of transferring? if any one the *Penns*; the defendant has shown that they did not: his conveyance proves this, and the technical presumption necessarily assumes that it was practicable to transfer the right by means of a grant or other conveyance: hence, the presumption does not operate, when such a grant could not from the nature of the case have been made. 2 *Stark. on Ev.* 1219. Who could convey this street? No one but the legislature. The Court of Quarter Sessions could not vacate it under the general road law. To presume a grant, would be presumption run mad; it would be against the positive proof in the cause: whatever the defendant's grants are, he has shown, and they exclude all presumption of others. All the cases of presumption have been for private nuisances and in civil actions; and there the presumption of a grant of an incorporeal right affecting the rights of another from length of time, may be rebutted by proof that the enjoyment was acquiesced in, not by the owner of the inheritance, but by one who possessed a temporary interest only; such as tenant for life or years, whose negligence or laches cannot be allowed to prejudice the owner of the inheritance. *Stark.* 1218. 2 *Wms. Saunders*, 175, *d.* How much less then, ought the acquiescence of the neighbours in a public nuisance affect the public right? And this is the reason why no length of time will legalize a public nuisance, though it may afford an answer to an action of a private in-

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dividual. *Chitty's Crim. Law*, 132. Unless where there is a limit to prosecutions *by statute*, there is no limit; there are some offences which by particular statutes must be prosecuted within a limited time, and this shows the general law to be to the contrary.

Public rights cannot be destroyed by long continued encroachments: at least the party who claims the exercise of any right, inconsistent with the free enjoyment of a public easement or privilege, must put himself upon the ground of prescription, unless he has a grant or some valid authority from the government. *The Inhabitants of Arundel v. Hugh M'Cullough*, 10 *Mass.* 70.

A right of prescription cannot exist in the present case, because the street itself is within the memory of man; when it was laid out is well established; the buildings and erections are recent; the defendant has proved when they were made. When a building has continued time out of mind, then it is an ancient one, and it will be intended that it was first put up by a composition with the owner of the land, on laying out the road. 1 *Hawk.* 694. But the positive proof is to the contrary of all this: these buildings were erected long after the street was laid out. There was no composition with the *Penns*; there could be no agreement at the laying out of the town, and the act of the 22nd of *April*, 1794, erecting *Pittsburg* into a borough, is conclusive on the operation of time. 2 *Dall. State L.* 588. The last section of that act gives to the borough of *Pittsburg* all such powers, jurisdiction, &c., as are enjoyed by the burgesses and inhabitants of *Reading*. That act of incorporation, 2 *Dall. State L.* 124, provides that where any buildings have been heretofore erected within the original plan of the said borough, and shall happen to encroach on any of the said streets, they shall not be deemed nuisances or abateable as such; but, to prevent a continuance of such encroachments, after such buildings shall be decayed or require rebuilding, the owner of said buildings shall not rebuild on the street, and in case he shall so rebuild, the same shall be taken and adjudged a public nuisance, and be abateable as such. Thus by positive law, we can see no time can legalize these encroachments, or be a bar to the public prosecution; but that they shall be abateable: the encroachments here have all been made since this act, or all have been repaired since its passage.

I will now state the reasons of Judge ROGERS's dissent:—

ROGERS, J.—

“I would not wish to be understood as saying, that the Circuit Court erred in the principle of construction laid down to the jury, but merely as expressing some doubts which the commonwealth's counsel had no opportunity of removing. The original agreement between the proprietors, and *Craig* and *Bayard*, was made *January*, 1788. At that time, it does not appear that there was any intention to lay out a town. By that agreement, there can

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be no question that *Craig* and *Bayard* purchased all the lands lying between the rivers *Monongahela* and *Allegheny*. Their rights would be bounded only by the rivers. Before a deed was made of the premises, the town of *Pittsburg* was laid out, according to a plan made by Mr. *Woods*; and in the deed conveying the property, there is reference to the plan, as a description of the property; but, at the same time, the boundaries of the right are, as in the agreement, the rivers *Monongahela* and *Allegheny*. There is no question that the deed may control the agreement; but to do so, it should be clearly in opposition to it, and we are not to suppose that the parties would all give up a right, and a valuable one too, without it clearly appears to be so. If, then, you reconcile the deed with the article, it would best comport with the intention of the parties, which is the general rule. It has occurred to me, that after the purchase, it was resolved to lay out the town, and this with the consent of *Craig* and *Bayard*, whose rights would be affected. There is then, no difficulty in giving effect to all the words in the deed. There would be an easement in the public, but the right of soil would be in *Craig* and *Bayard* and their representatives. This construction is fortified by the fact, that the party went into possession, and has continued to enjoy it as their property, from that time until the present."

"I cannot exactly agree with the broad proposition laid down, that no length of time, coupled with the enjoyment of a right of property, will be a bar to an indictment for a nuisance. I look upon it as a doctrine of the most extensive nature, and alarming in its consequences. It will affect, more or less, most of the towns in *Pennsylvania*, and may lead to a scene of controversy, destructive to private rights and the public peace."

Even on the doubt of Judge *ROGERS*, as to the construction of the conveyance, and the endeavours to reconcile the conveyance with the original agreement, this would be a nuisance; for if it was admitted that the right of soil was conveyed to *Craig* and *Bayard* beyond the limits of their lots, yet it is conceded that the right of highway is in the public: the obstruction of this by stone walls and brick buildings, by the owner of the soil, would be a nuisance, indictable and abateable.

The motion for a new trial is therefore overruled, and this Court adjudge that the defendant pay a fine of one dollar and the costs of prosecution, that he abate the nuisance of his own costs, and stand committed until this sentence be complied with.

(Note.—It should have been mentioned in the introductory remarks, after the words "for about thirty-five years," that a prior owner of lots 143 and 144, erected a frame building on *Water* Street, near said lots, in the year 1796 or 7; but this building, after standing several years, was long since removed by the proprietor.)

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

SOUTHERN DISTRICT—OCTOBER TERM, 1827.

[CHAMBERSBURG, OCTOBER 31, 1827.]

MORITZ *against* BROUGH.

IN ERROR.

To set aside a will duly executed by a man of competent understanding, evidence is not admissible of declarations made by him, that he intended differently, and was importuned by his wife, or of the wife's high temper and interference with the testator in relation to his will.

WRIT of error to the Court of Common Pleas of *Adams* county.

On a feigned issue directed by the Register's Court to try the validity of a writing, purporting to be the last will of *Peter Moritz*, deceased, the witnesses to support the will deposed as follows:

Peter Mark "subscribed the will, as a witness, at the request of the testator; saw *J. Young* sign it also as a witness. He (*Young*) left this country a year ago (1824,) for *Ohio*. *William Hosack* also signed it as a witness; all at the request and in the presence of *Peter Moritz*, deceased. He (the testator) died last summer, (1824.) He was of sound mind when he executed the paper. Witnesses signed. Witness wrote it, and took it down from the old man's dictation. Witness is brother of Mrs. *Moritz*."

"Will read to the jury, dated the 25th of *December*, 1817. *William Hosack* (another subscribing witness) proved the execu-

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tion of the will as his (testator's) deliberate act, and in his sound mind. He said nothing, but simply gave his consent to the execution of it. *Moritz*, died of a cancer. It began many years before his death, but not bad till two years before his death."

The record proceeded as follows:

"For the defendant. *Daniel Knouse* called. Defendant offers to prove that about a couple of months before the will was made, and just after the marriage of *Jacob Brough*, (the defendant) and *Polly*, daughter of *Peter Moritz*, that her mother (testator's wife) was dissatisfied with the marriage, and in presence of the witness, told the old man he *should* now make a will, and that *Polly* should not be left any thing, and that the old man said there was time enough. But the old woman insisted it should then be done, and that they (*Brough* and wife) should be left nothing. That the old man was opposed to the arrangement so proposed by his wife. That the old woman exercised a great control over the old man at all times, was a woman of high temper, managed the whole concerns of the establishment in doors and out of doors, and that he was a man of very easy disposition. To be followed with declarations of the old man, both before and after the date of the paper read, that he had always intended a different disposition of his property, and also that the will was different from his wish. That he said he was importuned by his wife, and that the will was made through such importunity, and fear of violence from his wife."

"Objected to—That such declarations of *Peter Moritz* while in the full exercise of his mind cannot be given in evidence, to establish duress, coercion, fraud, or importunity at the time of making the will. They were at a different time and place, &c. They are no evidence of the existence of facts, nor of a revocation of the will."

"Objection overruled by the court, and exception by plaintiff's counsel."

"It was stated by the witnesses, that Mrs. *Moritz* was a high tempered woman, had considerable control over her husband, managed affairs in the house and out. When witness had borrowed a horse from husband, and was to get it next morning, the old woman would not let him have it, said they wanted it that day. The old man said he was sorry for the disappointment; that the horse would stand in the stable all day, but his wife must have her way, and witness must do without. Old man said he had not been opposed to the marriage of *Polly* to *Brough*. He esteemed her as much as ever, and like his other children."

"That the old man drank hard by times, and was occasionally unfit for business; was a man of easy mind and temper. Before the execution of the will, old man had often said he intended to divide his property equally among his children, giving *Polly* the old place, as *Peter* was not fond of keeping tavern. He was well

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known to the witnesses, was of sound mind up to the time of his death, except when under the influence of drink."

"The defendant offers to prove that *Peter Moritz* the elder, repeatedly said, after the making the will, from the time of making the same till near his death in 1824, that the will was not made according to his wish, that he was plagued by his wife to make it as he did, and that he was teased by her importunity to make it, so as to cut out his daughter *Polly*, and that he had made it so to get clear of her importunity."

"Objected to, and objection overruled. *Per Curiam*. Declarations accompanying the acts inquiring into, are evidence to explain their character. The will is incomplete till the death of the testator, and the continuance of duress or control, and the omission to revoke, are all parts of the *res gestæ*, and on this ground the evidence offered we think is admissible, as well as on the ground of ascertaining the state of his mind, and accounting for the omission to revoke; and on the ground that they were against no one's interest *at the time they were made*. And see also the case of *Rambler v. Tryon*, 7 Serg. & Rawle, 95."

Exception by plaintiff's counsel.

The cause was argued in this court by *Stevens* for the plaintiff in error, he cited, *Jackson v. Kniffen*, 2 Johns. Rep. 31, and by *Dunlop* for defendant in error, who cited and relied upon 3 Swinb. part 7th, Sect. 1, *Ib.* Sect. 2, *Ib.*, Sect. 18, and *Nelson v. Oldfield*, 2 Vern. 76. 7 Serg. & Rawle, 95.

The opinion of the court was delivered by

TOD, J.—It seems to be conceded that in disputes respecting the insanity of a testator, or imbecility of intellect and consequent imposition, the declarations of the supposed testator have been frequently admitted in evidence. Yet it appears to me there must be some cases where parol evidence of the declarations of a testator, may not be permitted to defeat a will otherwise valid. I could wish that the plaintiff in error had thought fit to apply to the court below for new trial. Indeed I do not know, that all the evidence given on the trial is returned upon this record. The substance of it appears to be set out; and it is not our part to presume, that any thing material has been omitted.

There are three subscribing witnesses to the paper. It appears one of them lives in *Ohio*. His deposition was not produced by either party. The other two witnesses were examined upon the trial. On the question, whether this is a fit case for admitting parol proof against the will as written, it is a matter which to me seems to deserve very great consideration, that at the precise time of making and executing the instrument, there is no suggestion of any importunity, compulsion, or influence, lawful or unlawful. Further, on this head, though it is said and not denied, that the paper thus executed was put into the hands of *Peter Mark*, the

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scrivener who drew it, who was the brother of Mrs. *Moritz*, she being a devisee therein of the old place, yet there appears no proof nor allegation, that the will thus made was out of the testator's power at any time during his life, or that in all that time, nearly seven years, the testator attempted or expressed a wish, actually to destroy or cancel the writing, or to make a new will.

Can such a testament, made by a man of sound mind and in good health, be set aside by parol proof of these declarations of the testator, or rather, can such parol proof be permitted to go to the jury to defeat a will thus executed, is the question. The counsel for defendant in error, relies on the case of *Nelson v. Oldfield*, (2 *Vern.* 76,) decided, as he alleges, solely on the proof of declarations of the testatrix. And it does appear to be so. Yet it seems not an authority to be much depended on. The counsel has not shown that the case has been confirmed, or followed by any decision in this country or in *England*, or mentioned with approbation in any book. The point was incidental, and appears not to have been contested. The instrument had been proved in the spiritual court, and acted upon as valid. Besides, it is quite possible that the will in that case had been executed previously to the statute of frauds and perjuries; for the case of *Nelson v. Oldfield*, was decided only some eight or ten years after the making of that statute.

The counsel has also adverted to some strong passages in *Swinburn*.

"A testament is originally void, or at least voidable, when the testator is compelled by fear, or circumvented by fraud, or overcome by immoderate flattery to make the same." 3 *Swinb. part* 7. *Sect.* 1.

"A testament already made, becomes void when the testator intending to make a new testament, is forbidden or crossed, so that he cannot or dare not do as he intended." *Ib. Sect.* 18.

"The testament is void, not only when the testator is prohibited by threatenings, or hindered by fraud, but when he is overcome by importunate requests, and fraudulent persuasions, not to alter his former testament;—and this holds though there be no stronger proof of violence, or impediment offered to the testator in this case, than the assertion of the testator himself." *Ib. Sect.* 18.

"Again, if the testator after making of the testament, do affirm or protest generally, that the testament by him made was done through fear, not expressing particularly by whom he was compelled thereunto, such bare protestation does not make void the testament; but if the testator doth express by whom he was constrained; protesting that he would gladly alter the instrument, but for fear of the persons by him named; by such assertion the testament is void, at least in the prejudice of those persons." *Ib. Sect.* 2. This doctrine in *Swinburn*, strong as it is to the point, is deemed not to be authority. Since his time the law has been changed; in *England* by the statute of frauds and perjuries, and

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here by the act of assembly of 1705. When *Swinburn* lived, wills by parol were permitted, and a parol revocation of a written will, even of land, was valid. (*Ib. sect. 15.*) But that was not all. Not only did a bequest become void if the legatee became a heretic, or an apostate, (*Ib. sect. 22.*) but also, "if the legatee did grievously defame and slander the testator, or curse him with wicked speeches." (*Ib. sect. 22.*) And not only was a bequest void if the legatee should become the enemy of the testator, but void also, if the testator became an enemy of the legatee, though without any reason. "Albeit the testator himself was the cause of the enmity, and the legatee in no fault, yet shall the legatee lose his legacy; which conclusion may seem hard, but the reason is easy, namely, because when the testator hath conceived enmity, then is he presumed to have altered and revoked his will." (*Ib. sect. 22.*)

It seems to me, if the law then was, that a parol revocation of a will was good, and if the enmity of a testator, arising after the execution of a will was itself a revocation, and if a man's declarations are, and always must be, evidence, and often the only evidence of his enmity, then the medium of proof, by such declarations, as described in *Swinburn*, was perfectly consistent with the law of that day. But the law, as to making, changing, and revoking wills and bequests being now totally changed, *Swinburn's* authority, I take it, is ended as to all these matters. It would be tedious to recite from *Coke*, (3 *Rep.* 36,) *Blackstone*, (2 *Com.* 376,) *Cruise's Digest* (title *Devise*, cap. 5, sect. 1,) and other books, the uncertainty, litigation, frauds, perjuries, and other mischiefs under the old law permitting verbal wills; and verbal revocations, or loose and doubtful written dispositions. In *England*, the remedy was by the statute of frauds and perjuries, the provisions of which are immaterial to us, having a statute of our own passed for the same purposes in 1705. This act of assembly requires all wills to be proved by two witnesses, directs that no nuncupative will shall be good for any estate worth above thirty pounds, unless proved by two witnesses who were present, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the person present, or some of them, bear witness that such was his will. And, that after six months past, after speaking the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony or the substance thereof, were committed to writing within six days after the making of the said will. And, by the sixth section, that no will in writing, concerning any goods or chattels or personal estate, (decided to apply also to lands, 2 *Yeates*, 170,) shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words or will, by word of mouth only, except the same be in the lifetime of the testator commit-

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ted to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by two or more witnesses. Such being the plain law, my opinion is, that the evidence offered by the defendant below, was not competent to go to the jury. There was no ground laid for admitting the conversations of the testator, nor for admitting proof of the assertions of the wife, two months before the will was drawn, that he *should* make a will, and that *Polly* and her husband should be left nothing. It seems to me that her management of affairs indoors and out-of-doors, her high temper and control over her husband, as far as is shown by the evidence, would be but very small matter in the eye of the law; and hardly admissible even under the old rules laid down in *Swinburn*, especially when there was no proof, even by the husband's declaration, of any attempt by the woman to hinder or dissuade her husband from making a second will, or cancelling the first. Even if she had interfered throughout, I am not prepared to admit that it could make any difference in this case, not being aware of any rule of law by which influence used by a wife relative to the distribution by her husband of his property among her children, is to defeat a will made by a man of competent understanding. But, however that may be, it seems clear to me, that the evidence admitted was incompetent. Even if there was no positive law on the subject, there might perhaps be much doubt of the propriety of leaving to a jury to fix and define the true intent of a deceased person as to the disposition of his property, and almost to make a will for him, by hearing from witnesses their accounts of all that he may have said relative to his estate after his death. When men who have made, or are about to make, their wills, are questioned by expectants, and the friends of expectants, or when such men without being questioned, think fit to talk upon the subject, I take it, they do not always hold themselves bound to say the whole truth. It is something like the privilege of voting by ballot. Concealment is permitted, and deception, perhaps, sometimes practised. Such persons have many reasons to wish for quiet, and when disappointments are to happen, the law seems to put it in the power of a testator to escape, and to avoid bearing a part in the scuffles about dividing his property. And men who care for no concealment, may often really intend to make a will in a particular way, or to alter one already made, and after honestly declaring such intentions, may change their minds. My opinion is, that the judgment be reversed.

DUNCAN, J., concurred.

HUSTON, J., concurred.

GIBSON, C. J.—The inquiry was not whether the will was recorded, but whether one existed; and the argument that the declarations of the testator were inadmissible to prove a parol revocation, falls

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with the assumption of the fact that they were offered with that view. Nor is the testator to be viewed as a *witness*, but as a *PARTY*; and therefore all that might otherwise be objected, on the ground that his declarations were made without the sanction of an oath, or in the absence of the party to be affected, or without an opportunity to cross-examine, is beside the purpose of the argument. On the same grounds and with equal force, might an objection be urged against the admissions of a party in any case; and the danger to be apprehended from tampering with him, or from the use of loose and unguarded expressions, or from perjury in fabricating declarations that were never made, would be equally as great. Such considerations are to be referred to no general rule whatever, but to the discrimination of the jury under the particular circumstances of the case. A will is ambulatory till the testator's death, when an interest for the first time vests in the legatees; and, according to the strictest rules of evidence, his declarations made when he was the only party in interest, and therefore the only party who could be prejudiced by misrepresenting the fact, and when a motive for falsehood cannot be imagined, ought to be received as evidence against a party claiming under him. It is for this reason that the *admissions* of a party are competent. But were this otherwise, yet necessity is always a sufficient reason for dispensing with strict rules of evidence; of which the instance of a wife who is admitted to testify against her husband in a prosecution for an injury to her person, is the most apposite. Is the same necessity not to be found in cases like the present? None can be more urgent than that which dictated the admission of the evidence in *Nelson v. Oldfield*, where the testatrix had been forced, not only to make her will in a particular way, but also to swear that she would not revoke it. In such case it is idle to talk of the power of cancellation, or any other act which implies an admission that the instrument was originally valid. Ever after compulsion has ceased, the party may from habitual procrastination defer the act of cancellation till it is too late, just as others are prevented from making a testament, who never intended to die intestate. In such a case, if the declarations of the testator are to go for nothing, the injury is without a remedy. On the other hand, if they are admitted they go to the jury subject to the supervising control of the court, which is a sufficient guard against abuse. It seems to me therefore the evidence was properly admitted.

ROGERS, J., concurred with the Chief Justice.

Judgment reversed, and a *venire facias de novo* awarded.

[CHAMBERSBURG, OCTOBER 17, 1827.]

BARNET *against* WASHEBAUGH.

IN ERROR.

Where a legacy is charged on land, the sheriff's vendee under an execution takes the land discharged from the lien of the legacy, and the legatee must look to the proceeds of sale in the hands of the sheriff, unless the land is expressly sold subject to the legacy.

A *liberari facias* executed by the delivery of possession, is a satisfaction of the plaintiff's debt.

ERROR to the Court of Common Pleas of *Franklin* county.

The plaintiff in error, who was plaintiff below, *John Barnett*, was administrator *de bonis non* of *Sarah Price*, deceased: the defendant, *David Washebaugh*, was administrator *cum testamento annexo* of *William Scott*, deceased, with notice to *William Scott* and *Margaret Maris*, terre-tenants. The court below rendered judgment in favour of the defendant.

This was a *scire facias* upon a judgment, at the suit of *John Barnett*, administrator *de bonis non* of *Sarah Price*, (who had been substituted as plaintiff in consequence of the death of *Josiah Price*, administrator of *Sarah Price*,) to recover a legacy left her by her father, *William Scott*. This legacy was charged on all his real estate: *William Scott* devised his lands to his sons, *John* and *William*, (one of the terre-tenants,) and these lands were by partition divided between them. Before issuing the *scire facias*, *Josiah Price* issued an execution on his judgment, and levied upon the share of *William Scott*; took out a *liberari facias*, on which the sheriff returned, lands delivered to the plaintiff. The sheriff did not deliver the actual possession to the plaintiff, under the 4th section of the act of the 13th of *April*, 1807; but there was an agreement between *Price* and *Scott*, that *William Scott* should retain the possession for ten years, giving a bond with security, for the rent. Afterwards judgments were recovered against *John* and *William Scott* for their own debts; and, when *John's* lands were exposed to sale by his creditors, an application was made to the court, and by an agreement between *Josiah Price* and *William Scott*, the levy, inquisition, and *liberari facias* were set aside, with liberty to proceed by execution. Notice was then given to *Margaret Maris*, who purchased the land of *John Scott* at the sheriff's sale, that the claim of *Sarah Price* was unsatisfied, and a lien on the land. The *scire facias* was then issued against the administrator of *William Scott*, deceased, with notice to *William Scott* and *Margaret Maris*, terre-tenants.

Dunlop and *Chambers*, for the plaintiff.

1. The return of the sheriff on *liberari* does not preclude the

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creditor from showing the lands were not actually extended. The return is not evidence of actual possession, and evidence to contradict actual possession does not contradict the return. The return is only evidence of legal seisin. 9 *Serg. & Rawle*, 87.

2. Getting a judgment does not affect the legacy. *Nicholls v. Postlethwaite*, 2 *Dall.* 131, is a *Nisi Prius* case, not reported by Judge YEATES. Refunding bonds would have to be given, and to whom? None but liens of record are to be paid. *Kauffelt v. Bower*, 7 *Serg. & Rawle*, 80. *Lindell v. Neville*, 13 *Serg. & Rawle*, 229. No sheriff could act with safety, and it would be unreasonable to impose on him the searching into all wills in the register's office. The question of charge or no charge, is a very difficult and perilous one: the charge might be created by a will in a different county, or a dozen of wills in so many counties; or there might be a question of satisfaction from lapse of time; or the legacy might be to minors at twenty-one, and so not be due: so that the sheriff would in such cases not know what to do with the money. There might be a question whether the legacy bore interest. The legatees might be scattered over the whole *United States*. Suppose tracts devised to different persons, jointly charged, and but one sold—is the whole legacy to come out of the purchase money, or only *pro rata*? The only case to the contrary of our position, is the case of a ground rent. Where the vendor reserves a lien for purchase money, would that be taken out of the proceeds of sale? 8 *Johns.* 350. 11 *Johns.* 228. 12 *Johns.* 162. 13 *Johns.* 464, show, that in *New York* sales are made subject to liens without inconvenience.

Crawford, contra.

1. Delivery on the extent is a satisfaction of the debt. There was actual possession. At common law, delivery was satisfaction. 2 *Cruise*, tit. 14. *Stat. Merch. sect.* 49, p. 74. 2 *Wms. Saund.* 68, c. note. Re-extent is given by 32 *Hen.* 8, c. 5. *Co. Litt.* 219, d. 7 *Com. Dig. Stat. Staple*, D. 8. If conusee evicted of all but one acre, he shall not have a re-extent. This gave rise to 8 *G.* 1, c. 5, which does not extend to this country. Our act of assembly only provides for sales on subsequent executions or evictions. *Cro. Jac.* 388. *Sir Andrew Corbet's Case*, 4 *Rep.* 82. The plaintiff could not get at the other half of the land. 7 *Com. Dig. Stat. Staple*, D. 6, *liberari*. A party after a *liberari* may enter without actual delivery. *Hunt v. Breeding*, 12 *Serg. & Rawle*, 37, parties cannot set aside a levy so as to affect third persons.

2. In *Graff v. Smith*, 1 *Dall.* 485, it was held that a sale on a judgment against the ancestor, will divest the lien of debts under the intestate acts. *Nicholls v. Postlethwaite*, 2 *Dall.* 131, is the precise case, and one never as yet overruled, although a *Nisi Prius* case: on the contrary it is recognized in *Gause v. Wiley*, 4 *Serg. & Rawle*, 535. In *Bantleon v. Smith*, 2 *Binn.* 146, a rent charge satisfied out of the purchase money. *Gordon v. Corry*, 5 *Binn.*

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552, *S. P.* In *McCall v. Lenox*, 9 *Serg. & Rawle*, 306, it is said to be the practice to sell clear of all incumbrances.

3. If the law be so, there is no error in the charge. As to the supposition that the sale may have been expressly subject to this legacy, however strong the court may charge on facts, it is not error. *Porter v. M'Iroy*, 4 *Serg. & Rawle*, 442.

Chambers, in reply.—Suppose a yearly sum charged for the widow during her life, how is this to be estimated?—and if you go into legacies at all, where shall you stop?

The opinion of the court was delivered by

ROGERS, J.—In considering the questions raised by the plaintiff in error, I throw entirely out of view the agreement between *Josiah Price* and *William Scott*; for, however valid the agreement may be between themselves, they have not the power to affect the rights of *John Scott* and his creditors. They were not parties, and are not bound by the arrangement. Neither do I consider the fact that *Price* was not put into possession by the sheriff, as at all material. By the agreement between *Price* and *Scott*, *William Scott* becomes the tenant of *Price*, and is as much in the possession of the property, as if the possession had been actually delivered by the sheriff himself. Surely the debtor may surrender the possession if he chooses. He is not bound to enter into a lawsuit, nor make it necessary for the sheriff, by force, to transfer the possession. In this case, it was a transaction among relations; an amicable arrangement between them, by which at the end of the two years, and during the continuance of the lease, *Price* had the same remedy against *Scott*, that any other landlord has against his tenant. The question, then, fairly arises, whether a *liberari facias*, executed by the delivery of possession, be in *Pennsylvania* a satisfaction of the debt. In *England*, when an *elegit* is extended upon the land of the defendant, and returned filed, and possession delivered, it is a full satisfaction of the debt. And, so far was the doctrine carried, that it was formerly holden that the bare entry of a prayer of an *elegit*, upon the roll, was a bar to all executions. 2 *Saund.* 68, n. 1. 2 *Com. Dig. Stat. Merch.* sect. 49. p. 74. *Co. Litt.* 290. 2 *Bac. Ab. tit. Execution*, 701. 7 *Com. Dig. Stat. Staple*, 371, *New Ed.*

It is unnecessary, in this state, to depend upon those principles of the *English* law, as the sale of land, and proceedings under a *liberari facias* are regulated by our acts of assembly, and particularly the act of 1705. By the fourth section of that act, the sheriff is commanded on a *liberari facias* to deliver to the plaintiff such part or parts of the lands, tenements, and hereditaments, as shall satisfy his debts, damages, and interest, from the time of the judgment given, with costs of suit, according to the valuation of twelve men; to hold to him as his free tenement, *in satisfaction* of his debt, damages, and costs, &c. The words and spirit of the

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act of 1705, leave but little room for doubt, that possession delivered by the sheriff, or taken by consent of the parties, on a *liberari facias*, is a satisfaction of the debt.

It is contended, that the sheriff's vendee takes the land discharged from the lien of the legacy; that the legatee must look to the proceeds of the sale, in the hands of the sheriff, for the amount of the legacy charged on the land. It has been strongly argued, that great inconvenience would result from making it the duty of the sheriff to pay incumbrances created by will. That there are inconveniences and risks attending this construction, must be admitted; but, on the other hand, there would be equal damage in making purchasers at sheriff's sales run the risk of incumbrances, of which they had no notice. In whichever way the question is determined, we impose a burden, which will sometimes be attended with loss. There is great danger of causing the sacrifice of the property of unfortunate debtors, by increasing the risks of purchasers at sheriff's sale. Policy requires that the title should be in the hands of purchasers at judicial sales, as unfettered and untrammelled as possible. It best comports with public interest, that we should lessen, rather than increase their difficulties.

The sheriff is the officer of the law, selected for his intelligence, well paid for his trouble and responsibility, and in a situation much sought after. He has more capacity for, and better means of ascertaining the liens and incumbrances against the property, than purchasers at sheriff's sale possibly can have. The sheriff may protect himself by care and attention; and when there is a doubt, the money may be brought into court, or an indemnity may be demanded.

This question seems to have created difficulty at an early day. It was considered at *Nisi Prius*, by judges of great learning and experience, and it would ill become this court, without good reason, to depart from the law, so long and so well settled. In the case of *Nicholls v. Postlethwaite*, the question was, whether the legacies were a charge upon the land. The court having determined that these were a charge upon the testator's real estate, ordered, as a matter of course, (as it would appear,) that the money in the sheriff's hands should be first applied to the payment of the legacies. 2 *Dall.* 131.

The authority of this case has been since recognized in *Gause v. Wiley*, 4 *Serg. & Rawle*, 535. Justice DUNCAN says, (speaking of a legacy charged on land,) "This charge operates as a judgment, and sheriffs, in the sale of land, are bound to take notice of it; for where lands, charged with a legacy, are sold as the estate of the devisee, the legatee was let in as a judgment creditor to recover out of the purchase money the amount of his legacy." *Nicholls v. Postlethwaite*, 2 *Dall.* 131.

We have no doubt, that lands may be sold subject to legacies, and, that in such cases, the land goes into the hands of the sheriff's

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vendee charged with their payment. But, that it is so sold, should expressly appear. It should be the clear understanding of all the parties, that the one sold and the other purchased subject to the lien. The intention of the parties would best appear by the conditions of the sheriff's sale. No loose declarations, made at the time of the sale, or notice given of a subsisting lien, can amount to an agreement that the land should be sold subject to the lien of the legacy. It is the opinion of the court, that when land is sold by a sheriff, the sheriff's vendee takes the land discharged of the lien of the legacy, unless it should expressly appear, that the land was sold subject to the legacy.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 31, 1827.]

WALTERS *against* JUNKINS.

IN ERROR.

After the verdict is received and recorded, and the jury dismissed, they cannot alter their verdict on a certificate of mistake in rendering it. Such improper alteration is the subject of a writ of error.

• ERROR to the Court of Common Pleas of *Cumberland* county, in a suit brought by *John Junkins*, plaintiff below and defendant in error, against *David Walters*, plaintiff in error.

After the cause was tried in the court below, the jury retired in the evening, and by consent were to give in their verdict in writing; next morning the court met, the jury appeared in their box, and returned a verdict in writing, "we find for the plaintiff six cents damages." The court asked them if they found the defendant to pay all costs, or only the legal costs. The foreman replied "six cents damages and six cents costs." The verdict was recorded.

The jury, or most of them, remained in the box while another cause was progressing. On an interview between the foreman, and plaintiff's attorney, it was intimated that the jury had intended their verdict to be entered with full costs against the defendant. The court instructed the jury to retire, and certify what was their verdict, and how they had agreed it should be. They did so, and in a few minutes returned, and said their finding had been six cents damages and full costs; whereupon the counsel for the defendant objected to the entry being altered, but the court allowed the minutes to be corrected according to the real finding of the jury. The jury had not been formally told they were discharged, although the court had gone on a few minutes in another cause.

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Ramsay and Mahon, for the plaintiff in error, cited 6 *Johns.* 68. 7 *Bac.* 9.

Alexander, contra.—The proper remedy was motion for new trial. It was a subject for discretion of the court; and not of error.

Reply.—The court can exercise no discretion after the verdict recorded. All the cases go on this principle. The recording is a deliberate and solemn act, and done in a way to guard against mistake. *Whart.* 196, 197.

The opinion of the court was delivered by

ROGERS, J.—I am not aware, that this precise question has been settled by any express adjudication. Several cases have arisen, where jurors have been permitted to dissent from a verdict, before it is received and recorded, as in the case of a sealed verdict, and this has been the practice in *Pennsylvania*, although regretted by some of our wisest judges. After the jury have rendered their verdict, it is read to them, that they may say, whether the court have recorded it according to their finding. If any mistake should have occurred, it may be immediately corrected. To permit an alteration, after the jury are dismissed, would lead to great abuses, and I am unwilling to extend the principle further than the adjudged cases. How long shall this privilege last; how draw the line of distinction, and in what manner shall we ascertain whether it be the correction of an honest mistake, or the result of improper tampering, and out-of-door management with the jury? The remedy attended with the least danger is to commit the cause to another jury, on a motion for a new trial. In *Root v. Sherwood*, 6 *Johns. Rep.* 68, it is said,—there is no verdict of any force, but a public verdict, given openly in court. Until it is *received* and *recorded* it is no verdict, and the jury have a right to alter it, as they may a private verdict. In *Blackely v. Sheldon*, 7 *Johns* 32, the court say, the law is well settled, that before a verdict is *recorded*, the jury may vary from the first offer of the verdict, and the verdict which is recorded shall stand; and there are many cases in the books, of a jury changing their verdict, immediately after they have pronounced it in open court, and before it was received and entered, (*Dyer*, 204, *e.* *Plowd.* 209. *Saunders v. Freeman, Co. Lit.* 227, *e.*) The verdict is not recognized as valid and final, until it be pronounced and recorded in open court.

The law allows the jury all reasonable opportunity, before their verdict is put on *record*, and they are *discharged*, to discover and declare the truth according to the judgment. The court may also of their own accord, send the jury back to re-consider their verdict, if it appears to be a mistaken one, and before it is *received* and *recorded*. In 7 *Bac. Ab.* page 9, it is laid down to the same effect. So also, 1 *Inst.* 227, and *P. Wms.* 211.

Although these cases do not expressly determine the point, the

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inference is irresistible, that where the verdict is received, recorded, and the jury dismissed, as here, they have not the power to alter their verdict.

It is objected, that this is not the subject of a writ of error. The whole matter has been fairly stated on the record by the President of the Common Pleas, from which it appears to the court, that there was no authority to render judgment on the second finding of the jury. It was the ground for a motion in arrest of judgment, or for a writ of error to this court.

Judgment reversed.

[CHAMBERSBURG, OCTOBER 31, 1827.]

The COMMONWEALTH, for the use of HUSTON and others,
against MATEER and others.

APPEAL.

If there be a judgment against four, binding their real estate, and one dies, a *scire facias* may issue against the survivors, and the executors of the deceased: and, in that case, terre-tenants may come in and defend.

The administrator with the will annexed may recover from the administrators *pendente lite* appointed on the entry of a caveat against the will, the surplus in their hands arising from the sale of the testator's real estate by execution.

In such suit, the defendants cannot contest the validity of the will.

Administrators *pendente lite*, not using the money in their hands, are not liable for interest: but if they purchase the testator's land at a sheriff's sale, give a receipt for the money, and enjoy the property, they are bound to pay interest.

There is no particular form for an executor's renunciation: it may be by letter, showing such intention, provided it be filed in the proper office.

On appeal from the Circuit Court, the court will not set aside a verdict for mere misprison of pleading; it must appear injustice has been done, or some plain mistake been committed.

Scire facias, at the suit of the commonwealth, for the use of Samuel Huston, and John Clendennin, administrators with the will annexed of John Huston, deceased, against Andrew Mateer, John Creigh, and Benjamin Anderson, and James Graham, executors of Henry Quigley, deceased. The cause was tried before the Chief Justice, at a Circuit Court for Cumberland county, and a verdict and judgment were rendered for the plaintiffs. The defendants now appealed.

After argument by Alexander, for the defendants, and Watts, *contra*.

The opinion of the court was delivered by

ROGERS, J.—This is an appeal from the decision of Chief Justice GIBSON, at a Circuit Court, for the county of Cumberland.

(The Commonwealth, for the use of Huston and others, v. Mateer and others.)

John Huston, on the 17th of *May*, 1808, made his last will and testament, and gave legacies to his natural children, and made *Samuel Huston*, his brother, *Isabella Eckles*, and *Samuel Huston*, jr., his nephew, residuary legatees. The validity of this will being denied, an issue *devisavit vel non* was directed to the next term, 1811, No. 16, between *Sidney Culen*, and *Jonathan Huston*. On the trial of the issue, *Creigh* and *Mateer* attended to the suit, and conducted the defence. On the 24th of *December*, 1817, there was a verdict in favour of the will. On the caveat of the will, letters *pendente lite* were granted on the 8th of *August*, 1811, to *Creigh* and *Mateer*, bail in two thousand dollars. To the *August* Term, 1814, No. 105, judgment was obtained against the administrators of *Huston*, on which his real estate was sold for a large sum of money. On the record of the Common Pleas, there is this entry; in the case of the sale of the real estate of *John Huston*, deceased, by the sheriff, at the suit of *Andrew Carothers*, for the use, &c., upon motion of *Andrew Carothers*, Esq., it appearing to the court, that after payment of the judgments against the estate of *John Huston*, deceased, there remains a balance of ten thousand six hundred and fifty-two dollars and fifty cents, the court order that the said balance be paid to *Creigh* and *Mateer*, administrators, at such time as the said administrators shall have given an additional administration bond with security, to the register of *Cumberland* county, in the sum of twenty thousand dollars, and shall have the same duly certified by the said register to the prothonotary of this court. In compliance with this order, on the 21st of *November*, 1814, *Creigh* and *Mateer*, with *Anderson* and *Quigley*, their bail, executed a bond to the commonwealth of *Pennsylvania*, in the penalty of twenty-one thousand three hundred and fifteen dollars, conditioned, that if *Creigh* and *Mateer*, administrators *pendente lite*, shall make an inventory of the personal estate, and exhibit the same to the register, &c., administer the goods and chattels, &c., and settle the administration account, and all the rest and residue of the said goods and chattels, and credits, which shall be found remaining upon the said administration account, (the same being first examined and allowed by the Orphans' Court of the county of *Cumberland*,) shall deliver and pay to such person or persons respectively, as the said Orphans' Court, by their decree or sentence, pursuant to the true intent and meaning of the several laws now in force in this commonwealth, shall limit and appoint, then this obligation to be void, &c.

On the 10th of *May*, 1815, *Creigh* and *Mateer* settled their administration account, on which there was a balance of nine thousand three hundred and ninety-four dollars and twelve and a-half cents, and a supplemental administration account on the 13th of *February*, 1822, on which there was a balance of nine thousand two hundred and sixty dollars and forty-one cents in the hands of the accountants, subject to distribution according to law.

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After verdict on the issue, *devisavit vel non*, letters of administration, with the will annexed, were committed to *Samuel Huston*, and *John Clendennin*, and for the purpose of recovering from the administrators *pendente lite*, the balance in their hands, a suit was brought to the *August Term*, 1808, No. 98, against *Creigh* and *Mateer*, *Anderson* and *Quigley*. On the 16th of *September*, 1823, the death of *Anderson* was suggested. On the trial of the cause a verdict was rendered for the plaintiff for twenty-one thousand three hundred and five dollars, whereupon a writ of error was taken to the *October Term*, 1823, and judgment as follows; viz. 19th of *October*, 1824, after argument, it was suggested by the court, that the legal right of the parties could be best ascertained and determined in a *scire facias*, to be issued in pursuance of a general judgment to be entered on the verdict for the penalty of the bond, to be considered as cautionary only. The court do not intimate any opinion, whether the probate of the will would be conclusive or not, but leave it open for legal investigation on a writ of *scire facias*. This *scire facias* was issued to the *April Term*, 1825, No. 124, against *Andrew Mateer*, *John Creigh*, and *Benjamin Anderson*, and *James Graham*, executors of *Henry Quigley*, deceased.

In the course of the trial, the plaintiffs gave in evidence, the renunciation of *John Waugh*, and offered to prove the renunciation of *William Jameson*, the other executor appointed by the will of *John Huston*, deceased, by a letter filed the 10th of *January*, 1818, and addressed to *David Watts*, Esq., in these words:—

“*Pine Grove, December 8, 1818.*

“SIR,

“By *Samuel Huston*, the bearer, I understand that the late *John Huston*, deceased, nominated me as one of the executors of his last will and testament; my situation renders me altogether unfit for the execution thereof: you will please to have another appointed to officiate in my place, and oblige

“Yours, respectfully,

“*William Jameson.*”

It was objected, that there was no evidence of the renunciation of *Jameson*, and on the admission of the letter as evidence, error was assigned in the opinion of the court. It has not been generally supposed, that there was any particular form for a renunciation in *Pennsylvania*. Any writing which shows the intention of the executor will be sufficient for this purpose, provided it be filed, as it was here, in the proper office. It is immaterial that the letter was directed to Mr. *Watts*. It contains a request, that he should procure the appointment of another, and for this purpose it was presented to the register, filed in the office, and on the faith of the renunciation of the executors, letters testamentary with the will annexed were granted to the plaintiffs. Although before grant-

(The Commonwealth, for the use of Huston and others, v. Mateer and others.) ing the letters, the executors might have acted, notwithstanding the renunciation; yet, after they were granted, it was incompetent to them to resume their trust during the lifetime of the administrators. *Toller's Law of Executors*, 22.

Several objections have been made to the plaintiffs' recovery, which have been argued with great force, and apparent conviction.

It has been strenuously contended, that the suit cannot be sustained against *Mateer* and *Creigh*, and the executors of *Quigley*; that there is a misjoinder of action. It will be recollected, that suit was brought against *Mateer*, *Creigh*, *Anderson*, and *Quigley*, and that judgment was had against *Mateer*, *Creigh*, and *Quigley*, *Anderson* having died before the rendition of the judgment. This judgment was just, and it is certain, that the subsequent death of *Quigley* does not discharge his real estate. 2 *Saund.* 72. *Carth.* 105. 8 *Serg. & Rawle*, 457. The real estate is bound by the judgment, and payment alone will discharge the lien. Although I cannot perceive the propriety of the distinction, that the judgment survives as to the personalty, but not the realty, yet there is no question that it has been so adjudged directly in *England*, and incidentally in *Pennsylvania*, 2 *Saund.* 51, note 4. 8 *Serg. & Rawle*, 457. If then the judgment be joint, and survives against the land, the execution which follows the nature of the judgment should be joint also; or, at any rate, against the same persons, against whom judgment is rendered. The object of the *scire facias* is to ascertain the sum due, and for the defendants to show cause why the plaintiffs should not have execution against the survivors, and the lands of the deceased; for in no other way can he have the fruits of his judgment. If these principles be correct, and they are supported by the highest authority, this defence cannot avail the defendants. The objection which struck me with the greatest force, in this part of the case was, that the terre-tenants of the land, should have been made parties to the *scire facias*. This is the case always in *England*, and would be so here, were it not that executors and administrators, as respects debts, are the proper representatives of both real and personal estate. The suit is brought against them and not the heirs, and few, if any cases, have arisen, where the rights of the heirs are not well protected. The present Chief Justice, in the case of *The Commonwealth v. Miller's Administrators*, 8 *Serg. & Rawle*, 457, says, "According to our practice, as lands are assets for the payment of debts, so far as to be subject to a sale on a judgment against the personal representatives, it seems the executors or administrators are substituted for the heir, and the terre-tenant is not formally made a party on the record, but permitted to come in on notice, and defend *pro interesse suo*." It would perhaps be the better practice to give them notice at the commencement of the suit.

It is also contended, that the right to recover the money, is in

(The Commonwealth, for the use of Huston and others, v. Mateer and others.) the heir at law, or legatees, and not in the administrators with the will annexed. It must be taken, after what has been said, that they are the rightful administrators; and the question is, whether they have a right to the money to execute the trust of the will. To form a correct conclusion, two things are to be considered. What is the nature of the property in the hands of the administrator *pendente lite*, and what are the duties and powers of an administrator *pendente lite*? On the sale of the real estate, the residue, after payment of debts, goes to the same persons who would take the land; but the fund itself, is considered personal property for every purpose. This distinction was expressly taken in the case of *M. Clay v. Kreider*, which was warmly contested, and involved considerable estate, 11 *Serg. & Rawle*, 224. On the ground that the surplus money, arising from the sale of lands by the Orphans' Court was personal estate, it was held that the said surplus went to the personal representatives, and not to the heir. An administration *pendente* is a limited trust, and expires *eo instanti* the will is established. The very name implies that it cannot exist longer than the pendency of the suit. Upon the establishment of the will, the executor may immediately act, even before probate. There is no necessity for a citation to revoke the letters *pendente lite*, but the register may proceed to grant letters to the executors, or where they renounce to the administrator with the will annexed, and this was the course here pursued. The power and duty of an administrator *pendente lite*, is to pay and collect debts, file an inventory, but do not extend to a distribution of the estate. Indeed, how can he do so, until the contest about the will be ended? The legatees and distributees are different individuals, or vary in the amount to be received; otherwise there would be no dispute. If, then the fund be personal, and the administrator *pendente lite* cannot distribute the estate, to whom should the fund be committed but to the executor, or where they renounce, to the administrator *cum testamento annexo*? *Toll. Law of Exec.* 75, 102. 1 *Com. Dig. tit. Ad. F.* 336. 11 *Vin.* 100. 1 *Bro. R.* 87.

Another ground upon which this claim is resisted is, that the depositions of witnesses should have been received, to prove that *Huston* had not capacity to make a will. The foundation of this objection is, that the money is to be considered as land; and that, although the verdict and judgment, on an issue, *devisavit vel non* is conclusive as to the personal property, it is not so as respects real estate. If this were *res integra*, the solidity of the distinction might well be questioned; but, at any rate, I have no disposition to extend the principle. This fund, as I have before shown, must be considered as personal property, and upon this ground the court were correct in rejecting the evidence. 4 *Serg. & Rawle*, 192, 193. 5 *Serg. & Rawle*, 215. 11 *Serg. & Rawle*, 224.

The court has no difficulty in saying that the administrators are

(The Commonwealth, for the use of Huston and others, *v.* Mateer and others.) chargeable with interest; for, although administrators *pendente lite* are not liable for interest, if they have not used the money, yet, in this case, the administrators became the purchasers at the sheriff's sale, gave the sheriff a receipt for the purchase money, and have been, and are now, in the enjoyment of the property. It is not for them to make profit of the money, without paying for its use. 1 *Johns. Ch. Rep.* 620. *Id.* 527, 508. 4 *Johns. Ch. Rep.* 303, 307, 308. 2 *Mad. Ch.* 137. 2 *Fonb.* 188, 189. 1 *Binn.* 196. 4 *Serg. & Rawle*, 112.

On the inspection of the record, the court have no doubt it is the same record on which the *scire facias* was issued, and in which he demands execution. There is a mistake in one part of the *scire facias*, which is corrected in a subsequent part; and for a mere misprision of this kind, we are unwilling to reverse the judgment of the Circuit Court, and put the parties to a new *scire facias*; particularly, as a new trial on the judgment must produce the same results. To warrant the interposition of this court on a motion for a new trial and appeal, we must be clearly satisfied that injustice has been done, or some plain mistake committed. 3 *Yeates*, 320. 6 *Binn.* 296.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 31, 1827.]

NOBLE, for the use of WRAY, *against* HOUK.

IN ERROR.

If a justice of the peace erroneously rejects a recognizance offered by a party for the purpose of appeal within the twenty days, he may allow it after the twenty days, on discovering his mistake and the appeal is good.

ERROR to the Court of Common Pleas of *Cumberland* county; which was argued by *Penrose*, for the plaintiff in error, and *Watts*, *contra*.

The opinion of the court was delivered by

ROGERS, J.—It appears, from the docket of the justice of the peace, that judgment was given against the defendant by default, for seventeen dollars and fifty cents, on the 6th of *August*, 1825. That on the 26th of *August*, the defendant by his agent, *Barnet Aughenbaugh*, made application for an appeal, which was refused on the ground that the defendant must enter into the recognizance in person. That afterwards being convinced of his error, on the 31st of *August*, 1825, he entered the appeal, as of the 26th of *August*, 1825, when this appeal was demanded.

(Noble, for the use of Wray, v. Houk.)

A party should not be deprived of the trial by jury upon slight ground. In this case, the defendant made his application for the appeal, within twenty days; and it was by the mistake of the justice, that he was deprived of a re-examination of his cause. It is no answer to say, that he has his remedy against the justice, for in some cases the remedy would be worse than the disease. Besides, would it not be hard, not to permit the justice of the peace to avoid the consequences of an action, by the correction of an honest mistake? If the justice of the peace had persisted in his error, a court would have compelled him to permit the appeal; and shall we not allow him to do that voluntarily, which the court, upon a proper application, would have compelled him to do? It is true, that the fourth section of the act of the 2d of March, 1810, requires the appeal to be made within twenty days. The defendant is not within the letter, but he is within the spirit of the act. Within the twenty days he offered to appeal, which was refused by the justice. The default is not his, but the officer of the law. The whole proceeding appears to have been conducted in good faith by the justice, and we think he had a right, in this instance, to correct the mistake, and that the appeal was improperly dismissed.

[CHAMBERSBURG, OCTOBER 31, 1827.]

BOLLINGER *against* ECKERT.

IN ERROR.

Parol evidence is admissible, on the part of the plaintiff, in a suit on a parol promise to guaranty the payment of certain bonds assigned by the defendant to the plaintiff, to show that the scrivener, when drawing the articles of agreement, asked, if the obligor should fail, what would be the consequence; and that the defendant replied, "I will make them good."

ERROR to the Court of Common Pleas of Cumberland county, in which the plaintiff in error, *George Bollinger*, for the use of *James Todd* and others, executors of *Mary Patterson*, deceased, was plaintiff below, and *George Eckert* defendant.

Alexander, for the plaintiff in error.

Penrose and Mahon, contra.

The opinion of the court was delivered by

HUSTON, J.—This was an action on a parol promise to guaranty the payments of certain judgments which had been transferred by *Eckert* to *Bollinger* in part payment for a house sold.

There were articles of agreement drawn between *Bollinger* and *Eckert*, respecting the sale of a house, &c., by *James Todd*, as the scrivener: *Todd*, by assignment of the judgment to him, as one of

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the executors of *Mary Patterson*, was become interested. The articles of agreement were supposed to have been lost. *Bollinger* was released from all responsibility, by the plaintiffs in interest, who had used his name in this suit; and then his deposition had been taken in the cause, on notice, and a full cross-examination, saving exceptions to the competency of testimony.

The plaintiffs gave in evidence two judgments in favour of *Conrad Eckert*, the defendant in this suit, against *Jacob Fought*. One of them, No. 90, of *November*, 1814, on the docket of *Cumberland* county, for four hundred and fifty-eight dollars and seventy-eight cents, with stay of execution till the 1st of *December* next. The other, No. 130, of *January*, 1815. Under each of these suits was written on the docket, "8th of *April*, 1816: the above judgment, except the interest till the 1st of *April*, 1816, is marked for the use of *George Bollinger*;" and signed *Conrad Eckert*, and witnessed by a clerk in the prothonotary's office. Also, that the whole of the first judgment, and two hundred and forty-two dollars and seventy-five cents of the second, were assigned to *J. Ritsel*, who assigned them to the plaintiffs, and showed sundry executions, on which part of the debt was collected.

Bollinger's deposition, before mentioned, had been taken on the 2d of *January*, 1819; in which, among other things, he swore that *Eckert* had repeatedly told him the article of agreement was lost or destroyed. After showing that *Bollinger* was released, and that he had accepted the release, his deposition was offered.

Several objections were taken to it, which were all overruled, and properly. The defendant then produced and read the articles of agreement between him and *Bollinger*, dated the 5th of *January*, 1816, by which *Bollinger* "covenanted to convey to *Eckert* a house and lot in *Carlisle*, &c.: *Eckert* to pay *Bollinger* two thousand four hundred and sixty dollars and forty-three cents, as follows: one thousand dollars in hand, one bond dated the *March* 9th, 1815, for five hundred and fifty dollars, on *Jacob Fought*, interest from date: one bond dated *April* 1st, 1815, for four hundred and one dollars sixty-eight cents, interest from the date; and two bonds he had on *Bollinger* himself: which money is to be paid on the first week in *April*, 1816; at which time *Bollinger* is to give peaceable possession," &c.; and then objected to the deposition, as parol evidence, and contradicting the written agreement; and the court rejected the evidence, and exceptions were taken.

In *Browne v. Weir*, 5 *Serg. & Rawle*, 407, this court decided, that the assignor of a chose in action, who has no interest, and who has been released from all responsibility, is a witness. Perhaps, in every case, he who assigns any chose in action is, in some way, responsible, unless the assignment is expressly without recourse, and at the risk of the assignee, or unless he has a release from the assignee. But, when it appears he has no interest, he, like many other disinterested persons, is a legal witness. If there is reason

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to suspect concealed interest, or bias, it goes to his credit. The witness, however, does not appear to have been rejected on this ground, but expressly on the ground that his testimony varied from or contradicted a written instrument. This is a subject on which we have had many decisions. It has been much discussed, and many lawyers and some judges seem to have been, at different times, of different opinions. If the rule is, that parol evidence is admissible to correct mistake or fraud, and if the real contract of the parties is not expressed in the writing, this must arise from mistake or fraud. We seem now to have settled down in this; whatever material to the contract was expressed and agreed to when the bargain was concluded, and the article drawing, may, if not expressed in the article, be proved by parol. One case says, not where it is expressly contrary to the writing. In the case before us, the testimony, which was, that the bargain was that *Eckert* was to make good the bonds, and that the scrivener, when drawing the article, asked, "if *Faught* shall fail, what will be the consequence?" to which *Eckert* replied, "I will make them good," did not contradict any thing in the article. In the last reported case, in this court,—*Frederick v. Campbell*, 14 *Serg. & Rawle*, 293,—a parol agreement to warrant the quantity of land sold was decided to be admissible, though the deed contained no such express covenant.

Judgment reversed, and a *venire facias de novo* awarded.

AUG 1

APPENDIX.

[SUNBURY, JULY 5, 1826.]

CHAHOON and others *against* HOLLENBACK.

IN ERROR.

Judgments against vendor and vendee respectively, by their different creditors, bind the right of each in the land, whether legal or equitable.

In a *scire facias* to revive a judgment, the terre-tenants ought to be named; if not, the sheriff should return specially, that the parties notified were the terre-tenants in fact, and whether of the lands bound by the judgment.

If all the terre-tenants are not named in the writ, it may be pleaded in abatement.

Occupiers are not terre-tenants, but those who hold the fee.

A motion by an attorney to set aside a judgment by default against a party; is not an appearance for him.

Those only who claim by a conveyance subsequent to a judgment, can come under a *scire facias* as terre-tenants.

When the plaintiff relies on an equitable title, tender of money due must precede the action.

The trustee is the person, to whom a tender of money due the *cestui que trust* should be made.

After an express agreement to settle a doubtful title, founded on parol contract, the latter cannot be inquired into.

THIS was a writ of error to the Court of Common Pleas of *Luzerne* county.

The suit was an ejectment brought by *John Hollenback*, the defendant in error and plaintiff below, against *George Chahoon*, *Ziba Davenport*, *Sarah McCoy*, and *James McCoy*, the plaintiffs in error and defendants below, to recover about half an acre of land in the said county, in which a verdict and judgment were rendered in the court below for the plaintiff.

The plaintiff, *Hollenback*, claimed the title of one *Thomas Duane*, under a sheriff's deed, executed in pursuance of the following proceedings. A suit was instituted in the Court of Common Pleas of *Luzerne* county, to *April* Term, 1804, in which *William Bluckburn* was plaintiff, against *Thomas Duane*, defendant, and being removed to the Circuit Court, judgment was entered therein in favour of the plaintiff, on the 15th of *October*, 1806, with stay of execution till the 1st of *March*, 1807. A *fieri facias* issued to *December* Term 1807, and a *ca. sa.* to *March* Term, 1809, both which writs remained in the office. To *November* Term, 1811, a *scire facias* to revive this judgment issued at the suit of *Mary*

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Blackburn, administratrix of *W. Blackburn*, deceased, against *Thomas Duane* and terre-tenants, (not naming them,) to which the sheriff returned, served the same on *Thomas Duane*, in *Oswego* in *New York*, *George Chahoon*, *Eleazer Lake*, *Ager Hoyt*, and *Christian G. Voerhing*, in *October*, 1811. On the 11th of *November*, 1811, on motion of *Mr. Dyer*, judgment *nisi*. On the 9th of *January*, 1812, on motion of *Mr. J. Evans*, judgment *nisi* struck off, and the cause continued. On the 11th of *April*, 1812, *Ross* appeared for *Matthias Hollenback*, landlord of the terre-tenants, and subsequently he pleaded *nil debent*, and that the property in their possession was sold under a former judgment, and a sheriff's deed made to the said *M. Hollenback*. Issues being joined, a verdict was found for *Matthias Hollenback*, and his terre-tenants: this verdict not to prejudice the rights of the plaintiff against any other of the terre-tenants than those claiming under *M. Hollenback*, whereupon judgment, and judgment by default against *Thomas Duane*. *October 26th 1812.*

To *November Term*, 1815, another *scire facias* issued at the suit of the same *Mary Blackburn* as administratrix against *Thomas Duane* and terre-tenants, (not naming them,) which was returned *nihil*: and to *April Term*, 1816, an *alias scire facias* was issued in which there were the same parties, which was also returned *nihil*. On the 9th of *April*, 1816, judgment was rendered on motion. A *feri facias* was issued to *August*, 1816, and land adjoining that in dispute, sold, and a *feri facias* for residue of the debt issued on the 5th of *September*, 1821, returnable to *November*, 1821, which was levied on the land in controversy, and it was condemned and valued at two thousand four hundred dollars, and sold on a *venditioni exponas* to *August*, 1822, to the plaintiff, *John Hollenback*, for fifty dollars; and on the 8th of *August*, 1822, the sheriff made a deed to him accordingly.

The plaintiff then gave parol evidence to prove that *Thomas Duane* made the first improvements on the land, built a house and barn about 1791, and was living on the lot before *October*, 1806, when judgment was first obtained, and *Chahoon* lived there in 1806, 1807, and 1808 as his tenant, and it was admitted that *Chahoon* was not a tenant of *M. Hollenback*.

The defendants proved that a certificate for the land in question, was, with another lot, granted on the 10th of *November*, 1803, to *Obadiah Gore*, that a patent issued to him for them in *May*, 1805, and that on the 1st of *January*, 1811, *O. Gore* conveyed to *G. Chahoon* the land in dispute with the covenant of general warranty. *Chahoon* had previously leased from *Gore*.

The plaintiff, in reply, called *M. Hollenback* and other witnesses, who testified that in 1806, in conversations with *Gore* about the property, he stated, that it was *Thomas Duane's* property, and that he would convey it to whomsoever *Duane* should direct; but there was something of the price to be paid to the children of

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John Shepherd and *Avery Gore*, and he would convey if the purchaser would become accountable to them: that the lot belonged to *Duane*, but there was a claim on it. A deed was read from *Gore*, describing a property as bounded by the lot in dispute which was stated as belonging to *Thomas Duane*. It was further testified, that *Gore* said the patent was made to him to save some expense: that he did not dispute *Duane's* title, but *Duane* was to pay one or two hundred dollars the purchase money, or part of it.

The defendants requested the court to charge upon the following points:—

1. That the judgment was not revived by the *scire facias* to *November Term*, 1811, and proceedings thereon, so as to continue its lien upon the land in dispute.

The court charged;

George Chahoon was a party to the *scire facias* to *November Term*, 1811. He appeared by his attorney, *Mr. Evans*, and the judgment rendered revived and continued the lien of the judgment against *Thomas Duane*, against the land in dispute. The great object of the act of 4th of *April*, 1798, in requiring a *scire facias*, was to bring home notice to the terre-tenant of the intention of the judgment creditor to claim the lien of his judgment. And, if the executions previously issued cannot be regarded as sufficient for that purpose, the service of the *scire facias* on *George Chahoon*, and the proceedings thereon are.

2. That if the judgment was legally revived as to the land in dispute by the judgment of the 29th of *October*, 1813, yet the lien expired at the expiration of five years from that in consequence of the subsequent *scire facias* not having been served on *Chahoon*, if the jury believe he was in actual possession during the time those writs were in the hands of the sheriff.

The court charged;

After the judgment of the 29th of *October*, 1813, the writs of *scire facias*, and the executions and the proceedings thereon within the five years continued the lien of the judgment, whether *Chahoon* was in the actual possession of the premises whilst the writs of *scire facias* were in the hands of the sheriff or not. The evidence is, that he was in possession from *May*, 1806, until the service of the ejectment in this cause.

3. That the issuing the *fieri facias* to *November Term*, 1821, without a revival of the judgment, was irregular, and if the jury believe that the plaintiff was the owner of the judgment or directed those proceedings, he is affected by the irregularity, and cannot recover.

The court charged;

The *fieri facias* to *November*, 1821, is sustained by the previous proceedings in the case, and was therefore regular.

4th. That the purchase money due should have been tendered before the commencement of the suit.

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The court charged;

There is no pretence that the defendant or any person under whom he claims, has a lien upon the premises for the purchase money. There is some evidence that *Obadiah Gore*, when applied to in 1806, to convey the legal estate to judge *Hollenback*, who had contracted with *Thomas Duane* for the premises, said that something was to be paid to the children of *John Shepard*: and one witness, *S. Tuttle*, deposes, that upon his application to *O. Gore*, at the instance of judge *Hollenback*, to convey the legal estate, *O. Gore* told the witness that something was to be paid to *John Shepard's* children; to the best recollection of the witness, one hundred and fifty or two hundred dollars. Before the necessity of a tender can be urged in this case, it must be satisfactorily shown that purchase money was due, and the amount thereof, that there was some person to whom the tender could have been made, and that the plaintiff is bound in equity and good conscience to pay it before he is entitled to recover.

5th, 6th, and 7th. That if the jury believe that no purchase money was paid by *Duane* to *Gore*, the verbal contract is not valid.

That if the possession was not delivered by *Gore* to *Duane* in pursuance of the verbal contract, the contract is not valid.

That if *Duane* had but an equitable interest in the land at the rendition of the judgment, and there was a conveyance of the legal title to a third person prior to the levy, the judgment is not a lien upon it.

The court charged,

That if the jury believe from the evidence that *Duane* went into possession of the land in 1790 or 91, erected valuable buildings, and made other improvements, and remained in actual possession by himself and his tenants until 1808, a period of seventeen or eighteen years: that whilst he was in possession, *O Gore*, to whom the certificate and patent issued, declared that *Duane* was the owner of the premises, that he had no claim to them; that the certificate and patent were issued to him, including the premises in controversy for the purpose of saving expenses, and that he did finally purchase of *Duane* in 1807 or 1808, and that *Chahoon*, who purchased of *Gore*, was in possession of the premises as the tenant of *Duane*, at the time of the rendition of judgment: then, (as the defendants defend their possession upon the title of *Gore* alone,) evidence of the payment of the purchase money by *Duane* to *Gore*, or the delivery of possession by *Gore* to *Duane*, is not necessary to give validity to the title of *Duane*. Nor was the levy of an execution necessary to create a lien upon the land, if, as before observed, *Chahoon*, who purchased of *Gore*, was in possession of the premises as the tenant of *Duane* at the time of the rendition of the judgment.

To this opinion of the court the defendants excepted.

Errors were now assigned in the answers of the court to the

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first, second, third, fourth, fifth, and sixth points, upon which the court were requested to charge.

Dennison, for the plaintiffs in error.—The principal question is, whether the judgment in *October*, 1806, had not lost its lien on the land. The object of the act of the 4th of *April*, 1798, (3 *Sm. Laws*, 332,) was to do away all effect of a judgment as a lien after five years. The court erred in charging, that the *fieri facias* to *November*, 1811, revived the judgment as against *Chahoon*. There was no judgment on this *scire facias* against *Chahoon*, and therefore he was no way affected by the proceedings on it. *Coyle v. Reynolds*, 7 *Serg. & Rawle*, 328. The lien of a judgment expires at the end of five years from the judgment, without regard to a stay of execution not appearing on the record. *Black v. Dobson*, 11 *Serg. & Rawle*, 94. *Jackson v. Roberts*, 16 *Johns*. 537.

There was error in the answer to the defendant's fourth point, that the purchase money due should have been tendered before suit; in saying that it was necessary to show that purchase money was due; that there was some person to whom the tender could have been made; and that the plaintiff is bound in equity and good conscience to pay it.

Conyngham, for the defendant in error.—As the cause has been argued, there are but two points: 1. Whether the lien of *Blackburn's* judgment against *Duane* continued or was extinct as to the property in question. 2. Whether the plaintiff could recover without a tender of the balance of the purchase money due to Judge *Gore*.

1. In less than five years from the judgment, a *scire facias* issued against *Duane*, which was served on him and his terre-tenants, among whom was *Chahoon*. The entry was, "whereupon judgment, and judgment against *Duane* by default." By this we understand, that there was judgment in favour of *Hollenback* and his terre-tenants, for whom there had been a verdict, and judgment against *Duane* and all his terre-tenants. A judgment unreversed cannot be inquired into on account of its irregularity. *Colly v. Latimer*, 5 *Serg. & Rawle*, 211. The *scire facias* to *November Term*, 1811, which was served on *Chahoon*, gave notice to *Chahoon* that the plaintiff intended to hold this land bound; and evidence to contradict a sheriff's return is inadmissible. *Blythe v. Richards*, 10 *Serg. & Rawle*, 262, *Young v. Taylor*, 2 *Binn*. 229, *Pennock v. Hart*, 8 *Serg. & Rawle*, 378, decide that an execution taken out continues the lien.

2. The question submitted to the court was, "that the purchase money due should have been tendered before the commencement of the suit." The court answered properly, that it should be clearly shown that some purchase money was due, and to whom and how much; neither of which were shown. *Hollenback* was the purchaser at the sheriff's sale, and could not know any thing about the purchase money.

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Mallory, for the defendant in error.—The only exceptions are to the charge of the court: 1. Was the judgment revived, so as to continue the lien on the land in dispute. *Duane* was the owner of this house and lot; but, to save expense, it was agreed that the certificate and patent should be included in a patent to be taken out in the name of Judge *Gore*. This was a common practice among the *Connecticut* landholders, when they took out patents from the commonwealth, under the act of assembly. How or from whom *Duane* had obtained his title, does not appear. *Blackburn* obtained judgment against *Duane*. The *scire facias* within five years gave notice to *Chahoon*, that *Blackburn's* execution was intended to preserve the lien of the judgment against this property. But *Chahoon* did not purchase from *Duane*: he disclaims *Duane's* title, and stands on a purchase from Judge *Gore*. He purchased of *Gore* about five years after the judgment against *Duane*. Afterwards, and within the five years, a *scire facias* was served on him: he made no plea. Why did he not then make defence, if he had any, on that *scire facias*? Judgment was entered by default against *Duane*; which would affect his terre-tenants so as to continue the lien against them: at least it would affect *Chahoon*, on whom the *scire facias* was served. Then the *scire facias* to April, 1816, on which judgment was obtained, and followed by a *feri facias*, or *venditioni exponas*, was sufficient to keep up the lien against the land held by *Chahoon*. We have sold *Duane's* right to the property held by *Chahoon*. If he had no title, we got nothing by the purchase.

2. As to the necessity of a tender before suit? The patentee, Judge *Gore*, did not say any thing was due to him, but that something was due to *Avery Gore*, or the children of *John Shepherd*. But whether due for the purchase money of this land does not appear. (*N. B. Avery Gore* was the son of Judge *Gore*, and *Shepherd's* children were grandchildren of Judge *Gore*.) There was no money due to *Chahoon*, the defendant. *Bosler v. Niesley*, 5 *Serg. & Rawle*, 355. *Harris v. Bell*, 10 *Serg. & Rawle*, 43. Even if a balance of purchase money was due, yet he had let *Duane* into possession and therefore the purchaser under *Duane* had a right to recover the possession without tender of purchase money.

The opinion of the court was delivered by

GIBSON, C. J.—Under the *Susquehannah* Company, the title to the premises was in *Gore*, from whom *Duane* acquired an equitable title by a parol contract in part executed by delivery of possession, and payment of a portion of the purchase money. When the *Connecticut* claimants came to receive their titles from *Pennsylvania*, *Gore*, by agreement with *Duane*, obtained the patent in his own name, but in fact, as a trustee for *Duane*. The plaintiff below claims as a purchaser of the equitable title of *Duane*, at sheriff's sale; and *Chahoon*, under whom the other defendants hold.

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claims under a conveyance of the legal estate from *Gore*: so that the parties stand in the relation of *cestui que trust*, and trustee, the former demanding, and the latter resisting, a specific execution of the trust.

In this view, it is plain that the points which were made in relation to the supposed expiration of the lien, and the revival of it in 1811, were irrelevant. This court has held that the legal estate may be bound by a judgment against one, and the equitable estate, by a judgment against another; and that the interest of either may be transferred to a purchaser at sheriff's sale. Thus two purchasers, the one under a judgment against a vendor after articles for a purchase, the other under a judgment against the vendee, will stand in the relation of vendor and vendee with all the rights and remedies which those whom they represent, could have claimed or exercised against each other. The reason is, that a judgment against a vendor, binds, not only the legal estate, but the beneficial interest that remains in him, (which of course is an interest in the land to the amount of the unpaid purchase money;) and a judgment against the vendee, binds only the interest for which he has paid. The true question, therefore, was whether the sheriff's deed had transferred the equitable estate of *Duane*: And it undoubtedly had, even though the lien of the judgment were expired; unless indeed, *Duane* had conveyed it away previously to the levy, which was not pretended. A purchaser at sheriff's sale can be implicated in the consequences of having suffered the judgment to expire, only in a controversy with a purchaser from the debtor by a conveyance previous to the levy: in a controversy between judgment creditors, the only remaining case in which a question of the sort can arise, he cannot be implicated at all. Much less can a party who claims not under the title of the debtor, but adversely to it, derive an advantage from the expiration of the lien, it being sufficient for the purposes of the purchaser, that the sale and conveyance of the sheriff has vested in him the estate which was in the debtor at the time of the levy. In regard to these immaterial points, therefore, it is unnecessary to inquire whether the direction given were erroneous in the abstract or not, as it cannot in any event be used to the prejudice of the defendant in error.

The regularity of the proceedings on the *scire facias* to November Term, 1812, may be doubted; but they are sufficient to support the execution. The writ was issued against *Duane* and "terre-tenants," without naming them, which is the preferable course; and the sheriff returned that he had given notice to *George Chahoon*, *Eleazer Lake*, *Ager Hoyt*, and *Christian G. Voerhing*, without returning expressly, as he ought to have done, that they were terre-tenants in fact, much less that they were the terre-tenants of all the lands that were bound by the judgment. *Duane* was served by the present plaintiff under a special deputation: and,

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at the return of the writ, judgment was signed against all by default. At the next term this judgment was set aside at the motion of Mr. *Evans*, who entered no appearance, and took no further part in the cause; and at the term succeeding, Mr. *Ross* appeared, as it is expressed, for *Matthias Hollenback*, the landlord of the terre-tenants, and pleaded to issue, and it was found for him: Whereupon judgment was rendered on the verdict in favour of the terre-tenants, and, by default, against *Duane*. The plaintiff below was the party beneficially interested on the judgment, and also the purchaser under it at sheriff's sale; and the plaintiff in error availing himself of this circumstance, objects that all the defendants are not disposed of on the record, judgment not having been rendered expressly against *George Chahoon*, for whom it is said Mr. *Evans* appeared. But Mr. *Evans* did not appear at all. While the judgment by default remained in force, the cause was at an end, and no appearance could be received; and after it again became a cause depending, Mr. *Evans* did not think proper to appear. It is absurd, therefore, to speak of his motion as an appearance. *Chahoon* did not appear specially; and as he cannot be distinguished from the other defendants who appeared along with their landlord, *Hollenback*, he may be considered as disposed of by the judgment in their favour. We ought to favour every intendment in support of a judgment, rather than defeat the party on technical grounds, by laying hold on an ambiguity arising from the shortness of our entries, and the looseness of our practice: especially where, as here, no one who ought to have been heard, can be prejudiced. The persons summoned were in fact not terre-tenants; nor were they expressly returned as such, and the return was ill, as well for this cause, as for want of an averment that they were the terre-tenants of all the lands that were bound. (2 *Saund.* 7, n. 7,) for being entitled to contribution among themselves, all must be named; and, therefore, if the plaintiff attempt to name them in the writ, and omit the name of some of them, the omission may be pleaded in abatement. (*Ib.* n. 10.) But they were in fact not terre-tenants, because they were only occupiers, and not owners of the fee. (*Ib.* n. 9.) At all events none of them was a terre-tenant to *Duane*; for none derived title from him by a conveyance subsequent to the judgment, or had an estate that was bound by it; and none else is entitled to notice on a *scire facias*, for none can interpose between a judgment creditor and his right to satisfaction by execution, but one who may be prejudiced by the judgment. *Hollenback* and those who came into possession of the premises claimed by him, had a verdict, because he derived title by a conveyance which was previous to the judgment; and *Chahoon*, although having entered originally under *Duane*, now claims adversely by a conveyance from *Gore*. On this defective return, then, we ought not to treat as parties, persons who do not distinctly appear to have been treat-

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ed as such in the court where the action was pending: nor even if they had been, ought we to favour an intendment against the regularity of the proceedings for want of disposing of them when they ought never to have been brought on the record at all. But here the most natural conclusion is, that *Chahoon* appeared and pleaded along with the tenants of *Hollenback*.

On the next point the judgment is to be reversed. The jury were informed that before the necessity of a tender could be urged, it ought to appear that a particular sum was due, and that there was some person to whom it might have been tendered; and further, that a tender was a condition precedent to recovery of the possession. Although this be true in the abstract, yet viewed in relation to the evidence it had a tendency to mislead. The trust was established by the admission of *Gore*, who at the same time declared that one hundred or two hundred dollars were due from *Duane*, and to go to *Avery Gore*, and *John Shepard's* children; and as these children may have been minors without a guardian, and, therefore, without capacity to receive, the jury might naturally suppose they were alluded to as persons entitled to receive, taking their capacity for granted: consequently, that the want of such capacity would excuse the tender altogether. But there was no room for uncertainty on this head. The trustee in his lifetime, or his personal representative after his death, was obviously the person to receive the purchase money, and see to its application—a matter with which the *cestui que trust* had nothing to do. The jury may also have been induced to think, that under all circumstances, the necessity of tender was not clearly established; for the court certainly treated that as a matter resting in contingency: whereas payment of the purchase money and the conveyance of the title are, in all cases where the contrary has not been stipulated, mutual conditions which the parties are bound respectively to observe before calling for a specific execution of the contract: and with us, as was held in *Wolfley v. Snyder*, 8 Serg. & Rawle, 328, where the plaintiff relies on an equitable title, the tender must precede the action.

The remaining exception is not sustained. The original rights of the parties were given up for those which they acquired by the agreement to take out the title in a particular way. *Duane* might have contested the title before the commissioners, and if he had succeeded in obtaining the certificate and patent in his own name, *Gore* would have been concluded: but his right to do this was parted with for the terms of the agreement. Now if this right was not a doubtful one—and it certainly is far from being clear, that the original contract was within the statute of frauds—there is nothing in the point that was submitted; but even if it were doubtful, still the compromise of a doubtful right is a sufficient consideration to support an agreement. The original rights of *Connecticut* claimants have never been inquired into as between themselves. the courts

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never having gone further than to recognize a trust by agreement of the parties when the title was acquired under *Pennsylvania*; but where such a trust has been proved it has been executed according to the conditions and limitations of the contract.

HUSTON, J.—*Blackburn* obtained judgment on the 15th of *October*, 1806, with a stay of execution till the 1st of *March*, 1807. His administratrix issued a *scire facias* against *Duane* and the terre-tenants, to *November Term*, 1811, which was returned, served on *G. Chahoon* and several others, and served on *Duane* in *Oswego* by *J. H.*, deputed for that purpose. Judgment generally opened, and a trial for defendants, terre-tenants of *M. Hollenback*, and verdict for them. It is admitted on both sides that *Chahoon* was not one of them. Judgment for them not to prejudice the plaintiff against other terre-tenants. Judgment against *Duane* by default, on the 26th of *October*, 1813. To *November Term*, 1815, a *scire facias* by *Blackburn's* administratrix against *Duane* and terre-tenants. This *scire facias* refers to the first judgment in 1806, and recites it: it does not notice the *scire facias* of 1811. It was returned, *nihil*: No terre-tenants named in the writ or return. To *April*, 1816, another *scire facias* between the same parties. This writ issued on the 19th of *February*, 1816. The writ is not here: it was returned *nihil*, and, on the 9th of *April*, 1816, judgment. *Fieri facias* to *August*: land levied and condemned. *Venditioni exponas* to *August*, 1817—sold. *Fieri facias* to *November*, 1821: levied on houses and lots in question, valued at \$2,400; and, on a *venditioni exponas* to *August*, 1822, sold to *J. H.* for fifty dollars.

It was proved, that *Duane* made the first improvement on the lot: that *Chahoon* lived there at the time of the judgment, and ever since: that *Chahoon* was *Duane's* tenant in 1806 and 1807, till *April* 1st, 1808; but never was after: that he then leased from *J. Gore*: that *Duane* demanded no rent since 1807: that the house then rented for ninety dollars, and was much improved since: that *Hollenback*, as agent for *Duane*, settled with *Chahoon* about 1820, and demanded no rent after 1807: that there was a suit between *Duane* and *Chahoon*, and *Hollenback* was agent for *Duane*: that *Hollenback* has paid most of this judgment to *Blackburn's* attorney: that *Blackburn* revived this judgment, had *scire facias* issued and executions: that neither *Blackburn* nor his agent had any thing to do with these *scire facias*es and executions, but expressly refused: that the judgment was now assigned to *Hollenback*; but that he, as agent for *Duane*, or for some other reason, has paid off the greatest part of it.

It further appeared, that, under the compromising law, *O. Gore* returned this, with other property, to the commonwealth, and received a certificate for it, and, in 1805, a patent from this state. This patent was conclusive against all commonwealth claimants.

It appeared that in 1806, *O. Gore* had stated to different persons, that he held the lot in question for *Thomas Duane*, and was ready

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to convey to his assignee on receiving about two hundred dollars; but how this was due, did not appear: it appeared the title was taken to *Gore* in pursuance of some agreement between *Duane* and *Gore*.

How *Chahoon* ceased to be *Duane's* tenant, and leased from *Gore*, was not explained: but it appeared that *Duane* never claimed any rent from *Chahoon* after he had leased from *Gore*. In 1811, *Chahoon* bought from *Gore*.

I lay the *scire facias* of 1811 out of the case, because no judgment was had on it against *Chahoon*, and no legal one against *Duane*; the service on him in *York* state was void. If it was not, this judgment was still irregular; he should have been ruled to plead; and as no judgment was obtained against *Chahoon*, no subsequent *scire facias* could affect *Chahoon*, founded on the judgment on this *scire facias*. In fact the *scire facias* in 1815 pays no regard to this, and recites the judgment in 1806.

I think the lien of the judgment in 1806, was gone as to this lot, if *Chahoon* is a purchaser, either mediately or immediately, from *Duane*, whether *Duane* sold his equitable interest to *Gore*, and *Gore* to *Chahoon*, or whether *Gore* conveyed the legal title, and he and *Duane* divided the purchase money; but the fact that *Duane* ceased to claim or demand rent, and perhaps other facts would seem evidence of *Gore* and *Chahoon* having *Duane's* equitable interest. And if the jury should believe *Chahoon* stands in the light of a purchaser from *Duane*, whether of a legal or equitable right, it seems to me the act equally requires that *scire facias* should be served on him, or the lien of the judgment is gone. If the *scire facias* in 1811 is still undisposed of, the whole proceedings on the subsequent *fi. fa.* of 1815, are, at least as respects *Chahoon*, null and void, and the sheriff's sale vested no title against him in *J. H.* If the verdict and judgment for the defendant included him, he is equally safe.

It seems to me strange to consider *Chahoon* as still the tenant of *Duane* after 1807, in opposition to positive proof that he was not, and that *Duane* did not even allege that he was. The fact whether he was a tenant or a purchaser, is necessary to be ascertained. If a tenant, as he attorned to *Gore* without the consent of *Duane*, a *scire facias* perhaps need not be served on him, but if *Duane* released to *Gore*, and *Chahoon*, by his direction, became the tenant of *Gore*, and afterwards his vendee, the *scire facias* must have been served on him or the lien was gone. For it is admitted he resided constantly in the house, in sight of the courthouse. I think it was necessary that the jury should find the fact whether he was a purchaser or not; if they found he was a purchaser, the lien is gone.

The fate of the act of 1798, on the lien of judgments, is singular. In *Young v. Taylor*, an opinion of a single judge, entirely extra-judicial, made a strong impression; but it is entirely an *obiter*

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dictum. The sheriff's deed was not acknowledged, and so far from deciding that *Young's* lien on the lots was preserved, they recommend further proceedings to bring the matter before the court in such shape as that his right may be decided. The very point of the construction of this act came before this court, in *The Bank of North America v. Fitzsimons*, 3 Binn. 342. It is there said nothing can be more plain than this law. That no inconvenience will result from the law, but, on the contrary, it will promote the public convenience. The *dictum* of Judge YEATES was repeated again in *Lewis and Smith*. But in that case it was impossible to apply it to the matter before the court, for the levies were on personal property.

There have been several cases since, in the last of which it is said expressly the court will not decide, whether an execution will retain the lien of a judgment, except as to the lands on which it is levied.

In *Young v. Taylor*, the plaintiff had proceeded so irregularly, that the court refused to permit his deed to be acknowledged; there, also, the real plaintiff, the man who managed the suit, is the purchaser. At one time he notifies *Chahoon*, but obtains no judgment against him. He afterwards issues a *scire facias* on the judgment of 1806, and takes care not to notify him. He gets his judgment of *Duane* revived, leaving the suit which was to decide whether *Chahoon's* house and lot were liable, undecided. He sells in this uncertainty, and himself purchases for five hundred dollars, property which rented at ninety dollars *per annum* ten years before, which had cost fifteen hundred dollars, and which, twelve men on their oaths have said was worth two thousand four hundred dollars. He obtains this monstrous advantage by his own misconduct. For we must suppose if he had tried his *scire facias* of 1811, and a court and jury had decided that the property was subject to the lien, it would have sold for twenty times as much as it has been sacrificed for. I am not speaking of a case where a third person purchases at sheriff's sale; but of a case where the plaintiff or his agent purchased, after having proceeded with such irregularity as to deter prudent men from bidding against him. To make any intendment in favour of such a purchaser, would be to assist him in his oppression. For this reason, also, I think the cause ought to be reheard.

Judgment reversed, and a *venire facias de novo* awarded.

AN
EULOGIUM
UPON THE
HON. WILLIAM TILGHMAN,
LATE CHIEF JUSTICE OF PENNSYLVANIA.

BY HORACE BINNEY.

Philadelphia, July 7, 1827.

DEAR SIR,

Immediately after the death of Chief Justice Tilghman, the Members of the Bar expressed a wish that an Eulogium should be pronounced upon his character; and having passed a Resolution to that effect, they appointed a Committee to make the necessary arrangements. We now request that you will suffer us to impose the duty upon you; feeling as we sincerely do, that we shall thus gratify the anxious desire of our professional brethren, and that justice will be fully done to the merits of the deceased.

With great esteem and respect, your friends and obedient servants,

CHARLES CHAUNCEY.
JOSEPH R. INGERSOLL.
JOHN M. SCOTT.

HORACE BINNEY, Esq.

Philadelphia, July 9, 1827.

GENTLEMEN,

I am extremely sensible of the honour which you have done to me, by the request communicated in your note of the 7th instant. My inability to do justice to the eminent person referred to, ought I fear to deter me from attempting to portray his character; but my deep veneration for the virtues and learning of Chief Justice Tilghman, will not permit me, under any sense of my own defects, to question the wishes of my brethren of the Bar.

I am, very faithfully, your friend and servant,

HORACE BINNEY.

CH. CHAUNCEY,
J. R. INGERSOLL, } Esquires.
JOHN M. SCOTT.

At a meeting of the Bar of Philadelphia, held at the Hall of the Circuit Court of the United States, on the 13th day of October, 1827,
WILLIAM RAWLE, Esq. *Chairman*, JOHN SERGEANT, *Secretary*,

The following Resolution was unanimously adopted:

Resolved, That the thanks of the bar be offered to Mr. Binney for his discourse pronounced this day, equally worthy of the profession, the subject, and the speaker; and that he be requested to furnish a copy for publication.

W. RAWLE, *Chairman*.

Attest,

JOHN SERGEANT, *Secretary*.

EULOGIUM.

GENTLEMEN OF THE BAR OF PHILADELPHIA:

IF the reputation of the living were the only source from which the honour of our race is derived, the death of an eminent man would be a subject of immitigable grief. It is the lot of few to attain great distinction, before Death has placed them above the distorting medium, through which men are seen by their coteremporaries. It is the lot of still fewer, to attain it by qualities which exalt the character of our species. Envy denies the capacity of some, slander stigmatizes the principles of others, fashion gives an occasional currency to false pretensions, and the men by whom the age is hereafter to be known, are often too much in advance of it to be discernible by the common eye. All these causes combine to reduce the stock of living reputation, as much below the real merits of the age, as it is below the proper dignity of man; and he who should wish to elevate his spirit by great examples of wisdom, of genius, and of patriotism, if he could not derive them from the illustrious dead, would have better reason than the son of Philip, to weep at the limits which confined him. To part with the great and good from a world which thus wants them, and not to receive thereafter the refreshing influence of their purified and exalted fame, would be to make Death almost the master of our virtue, as he appears to be of our perishable bodies.

The living and the dead are, however, but one family, and the moral and intellectual affluence of those who have gone before, remains to enrich their posterity. The great fountain of human character lies beyond the confines of life, where the passions cannot invade it. It is in that region, that among innumerable proofs of man's nothingness, are preserved the records of his immortal descent and destiny. It is there that the spirits of all ages, after their sun is set, are gathered into one firmament, to shed their unquenchable lights upon us. It is in the great assembly of the dead, that the Philosopher and the Patriot, who have passed from life, complete their benefaction to mankind, by becoming imperishable examples of virtue.

Beyond the circle of those private affections which cannot choose but shrink from the inroads of Death, there is no grief then for the departure of the eminently good and wise. No tears but those of gratitude should fall into the graves of such as are gathered in honour to their forefathers. By their now unenvied virtues and talents, they have become a new possession to their posterity, and when we commemorate them, and pay the debt which is their due, we increase and confirm our own inheritance.

We are assembled, my brethren, to pay a part of this debt to one, to whom we shall be greatly in arrear, after we have exhausted all our terms of respect and endearment. We come to honour one who, during a long life, was an honour to his profession and his country. We come to lay claim to his reputation as part of our own, and as an accession to that invaluable estate, which is to pass from generation to

generation of this commonwealth, to all future time. It is in obedience to your call, that I shall endeavour to show the value of this claim, by a sketch of the life and character of the late Chief Justice Tilghman.

WILLIAM TILGHMAN was born on the 12th of August, 1756, upon the estate of his father, in Talbot county, on the Eastern Shore of Maryland, about a mile from the town of Easton.

His paternal great grand-father, Richard Tilghman, emigrated to that Province, from Kent county, in England, about the year 1662, and settled on Chester river in Queen Anne's county.

His father James Tilghman, a distinguished lawyer, is well known to the profession in Pennsylvania, as Secretary of the Proprietary Land-Office, and as having brought that department, by the accuracy of his mind and the steadiness of his purpose, into a system as much remarked for order and equity, as from its early defects it threatened to be otherwise.

His maternal grandfather was Tench Francis the elder, of this City, one of the most eminent lawyers of the province, the brother of Richard Francis, author of "Maxims of Equity," and of Dr. Philip Francis, the translator of Horace.

It is not surprising to find among the collateral ancestors of the late Chief Justice, the author of one of the earliest compends of scientific Equity, and a scholar accomplished in the literature of the age of Augustus.

In 1762, his family removed from Maryland to Philadelphia.

In the succeeding year he was placed at the Academy, and in the regular progress of the classes came under the instruction of Mr. Beveridge, from whom he received his foundation in Latin and Greek.

Upon the death of Beveridge, his place was filled provisionally by Mr. Wallis, who was perfectly skilled in the prosody of those languages, and who imparted to his pupils an accuracy, of which the Chief Justice was a striking example.

Dr. Davidson, the author of the grammar, succeeded Beveridge, and with him the subject of this discourse remained, till he entered the College in the year 1769, Dr. Smith being then the Provost, and Dr. Francis Allison the Vice-Provost, the latter of whom instructed the students in the higher Greek and Latin classics; and such was the devotion to literature of the eminent pupil of whom we are speaking, that after he had received the Bachelor's degree, and was in the ordinary sense prepared for a profession, he continued for some time to read the classics with the benefit of Dr. Allison's prelections.

I record these circumstances, because the Chief Justice himself has recorded them. He seems, throughout life, to have recurred with grateful delight to the studies of his early youth, to which he was able to refer his taste for letters, the bond that united him to society, after almost every other had been painfully broken.

In February 1772, he began the study of the law in this city, under the direction of the late Benjamin Chew, then at the head of his profession, afterwards Chief Justice of the Supreme Court of Pennsylvania, and at the close of the High Court of Errors and Appeals, its venerable President.

In the office of this gentleman, he continued until December 1776.

devoting himself to Littleton, and Coke, and Plowden, and the other fathers of the Common Law, at that time the manuals of the legal student, and at no time postponed in his estimation and regard, to the more popular treatises of later days.

From 1776 to 1783, partly on his father's estate, and partly at Chestertown, whither his family had removed, he continued to pursue his legal studies, reading deeply and laboriously, as he has himself recorded, and applying his intervals of leisure to the education of a younger brother. When, therefore, in the spring of 1783, he was admitted to the courts of Maryland, we may infer that an apprenticeship of eleven years, had filled his mind with legal principles, sufficient to guide and enlighten him for the rest of his life.

In 1788, and for some successive years, he was elected a representative to the Legislature of Maryland. His temper and habits were not perfectly congenial with active political life, nor was he at any time attracted by that career; but he was a republican, in the catholic sense, and took an active part in procuring the adoption of the Federal Constitution, to which as well as to its founders, and great first administrator, he felt and uniformly declared the most profound attachment.

In 1793, a few months previous to his marriage with Miss Margaret Allen, the daughter of Mr. James Allen, he returned to this city, and commenced the practice of the law, which he prosecuted until his appointment by President Adams, on the 3d of March, 1801, as Chief Judge of the Circuit Court of the United States for this circuit.

His powers as an advocate, but more especially his learning and judgment, were held in great respect by this community, surrounded notwithstanding as he was, by men of the first eminence in the land. His law arguments, which some now present may recollect, were remarkable for the distinctness with which he presented his case, and for the perspicuity and accuracy with which his legal references were made to sustain it. He was concise, simple, occasionally nervous, and uniformly faithful to the Court, as he was to the client. But the force of his intellect resided in his judgment; and even higher faculties than his as an advocate, would have been thrown comparatively into the shade, by the more striking light which surrounded his path as a judge.

The Court in which his judicial ability was first made known, had but a short existence. It was established at the close of the second Administration of our government; and although this particular measure was deemed by wise men on all sides, and is still cited by many of them, as the happiest organization of the Federal Judiciary, yet, having grown up amid the contentions of party, it was not spared by that, which spares nothing. In a year after its enactment, the law which erected the Court was repealed; and judges who had received their commissions during good behaviour, were deprived of their offices without the imputation of a fault.

An intimate friend of the Chief Justice has informed me, that in all their intercourse, he never knew him allude to the circumstance of having been a judge of that court. There was doubtless a painful recollection connected with it. It is known that his opinion was against the validity of the repealing law; for in a very able protest, published by Judge Bassett, another member of the same court, in which the

breach of the constitution was strenuously asserted, he remarks,—“ If any difference between me and my associates in office exists, it relates merely to the point of time for expressing our sentiments. I can confidently assert, that, on deliberation, they coincide with me in other respects.”

After the abolition of the Circuit Court, Mr. Tilghman resumed the practice of his profession, and continued it until the 31st July, 1805, when he was appointed President of the Courts of Common Pleas in the first district.

He remained but a few months in the Common Pleas. In the beginning of the year 1806, Mr. Shippen, the Chief Justice of the Supreme Court yielded to the claims of a venerable old age by retiring from the office, and on the 25th of February, Mr. Tilghman was commissioned in his place by Governor M^c Kean, himself a great lawyer and judge, and interested as a father in the court which he had led on to distinguished reputation in the United States.

From the moment of the late Chief Justice's appointment to that of his death, most of us, my brethren, have stood around him, and have witnessed the great work upon which his reputation rests. His life has been on the Bench,—his family has been the Bar,—his children are now before me. So obvious have been his walks to all,—so radiant with that light which is reflected from the path of the just, that no part of them is unknown to you; and I shall but revive the impressions and assist the recollections of each, while I endeavour to sketch the extent of his labours, the character of his judgments and of his mind, his temper and disposition, social, moral, and religious.

The higher judicial offices in our country, are posts of great distinction, and they owe it to their attendant exertion and responsibility. They put in requisition the noblest faculties of the mind, the finest properties of the temper, and not unfrequently they task to the utmost the vigour of an unbroken constitution. Very few, if any, of their duties are mechanical. There is no routine by which their business is performed without the expenditure of thought. The cases which come before the Judges are new either in principle or in circumstance; and not seldom the facts which ask for the application of different principles, are in the same cause, nearly in equipoise. There is consequently an interminable call upon the Judge to compare, discriminate, weigh, adopt, reject, in fine to bring into intense exercise his whole understanding. Where the profession is candid and well instructed, nothing that is obvious, and little that can be made so without deep consideration, is referred to the decision of the Judges. For them the universal intelligence of the world is at work to complicate the contracts and the duties of men. For them are reserved those Gordian knots, which, although others may cut, they must at least appear to untie. Every judgment is made under great responsibility to the science;—it must be a rule for the future, as well as for the past. It is made under an equal responsibility to the parties;—the Judge is the defaulter, when through his means the defaulter escapes. It is under a higher responsibility to heaven;—the malediction of an unjust sentence is heavier upon him that gives, than upon him that receives it.

He who, through a large portion of the short life of man, properly sustains such an office, studying all his causes with the intenseness of

personal interest,—improving the science by adding daily confirmation to the defences of liberty, reputation and property,—and at the last standing clear in his great account of justice impartially administered to the poor and the rich, the guilty and the innocent,—he that does this is entitled to all the homage which man ought to render to man, and may claim, but not till then, to stand by the side of our venerated Tilghman.

From the time that he took his seat on the Bench at March Term 1806, for the space of more than ten years, he delivered an opinion in every case but five, the arguments in four of which he was prevented from hearing by sickness, and in one by domestic affliction; and in more than two hundred and fifty cases, he either pronounced the judgment of the Court, or his brethren concurred in his opinion and reasons without a comment.

His attention from the beginning to the end of the twenty-one years that he presided in the Supreme Court, was undeviatingly given to every case; and he prepared himself for all that required consideration at his chamber, by taking an accurate note of the authorities cited by counsel, and of the principal heads and illustrations of their argument.

This labour was not performed to accumulate the evidences of his devotion to business, nor under subjection to an inveterate habit. He was far above all this. He did it under a sense of conscientious duty to retain such minutes as would enable him to examine the authorities, and to review the observations of counsel, after the illusion and perhaps the excitement of the public discussion had gone by. The contents of twenty volumes of reports, and upwards of two thousand judgments, most of them elaborate, all of them sufficiently reasoned, very few upon matters of practice, or on points of fugitive interest, attest the devotion of his judicial life; and although it is not meant to deprive of their share of the merit of these labours, the eminent men who survive him on the Bench, and who remain to continue and I hope to exalt the fame of our jurisprudence, I may say, and they will cheerfully admit, that he was the presiding spirit of their consultations, as he was of their court.

In addition to these strictly official duties, the Legislature of Pennsylvania, committed to the Judges of the Supreme Court, in the year 1807, the critical duty of reporting the English statutes in force within this commonwealth. The duty is called *critical*, for so undoubtedly it was considered by the Chief Justice. The service exacted an unlimited knowledge of our colonial legislation, and of the practice and administration of the law in the Province, through a period of nearly a century, in which there was not the light of a reported case. It required also an intimate familiarity with the written law of England, its history both political and legal, and a knowledge of the impressions which it had given to and received from the common law, during the course of many centuries. The selection moreover was to be made in the chambers of the Judges, without the aid of that best of all devices for eliciting the truth, an ardent, free, and ingenuous discussion by counsel. I need not say to the professional hearer, that the task was Herculean. In the course however of less than two years, it was performed; and the profession and the public are indebted to it for an invaluable standard of reference in a province of the law, before that

time without path or guide. It is not perfect. It has not the obligation of judicial authority. I speak the sentiments of its principal author. Some statutes are perhaps omitted. Still the original work will remain as a monument to those by whom it was erected, and who may now be said to rest beneath it. If it shall increase at all, it will be by the contributions which the hand of respect and affection shall bring to swell the tribute to the venerable dead.

The labours thus recited, my brethren, in addition to what we know to have been performed at Nisi Prius, and in Circuits through the State, entitle this eminent Judge to the praise of great industry, a virtue which it is an offence against morality to call humble, in one who is the keeper both of his own talent, and not seldom of that of others also. It was, however, industry of the highest order—a constant action of the intellect practically applied.

But the character of his mind as it shines forth in his judgments, is a subject of much livelier interest.

The first great property which they disclose, is his veneration of the law, and above all, of the fundamental Common Law. There is not a line from his pen, that trifles with the sacred deposit in his hands, by claiming to fashion it according to a private opinion of what it ought to be. Judicial legislation he abhorred, I should rather say, *dreaded*, as an implication of his conscience. His first inquiry in every case was of the oracles of the law for their response; and when he obtained it, notwithstanding his clear perception of the justice of the cause, and his intense desire to reach it, if it was not the justice of the law, he dared not to administer it. He acted upon the sentiment of Lord Bacon, that it is the foulest injustice to remove land-marks, and that to corrupt the law, is to poison the very fountain of justice. With a consciousness that to the errors of the science there are some limits, but none to the evils of a licentious invasion of it, he left it to our annual legislatures to correct such defects in the system, as time either created or exposed: and better foundation in the law can no man lay.

Those who study his opinions, while they may remark that he was unusually sparing of references to authority, will find that it was the result of selection and not of penury. He was not, however, what is sometimes termed a great case-lawyer. His memory did not appear to be tenacious of insulated decisions; nor is it usual for men of philosophical minds, who arrange the learning of their profession by the aid of general principles, to be distinguished by their recollection of particular facts. With the leading cases under every head, those which may be called the *light-houses* of the law, he was familiar, and knew their bearings upon every passage into this deeply indented territory; but for the minor points, the soundings that are marked so profusely upon modern charts of the law, he trusted too much to the length and employment of his own line, to oppress his memory with them. It was not his practice to bring into his judgments, an historical account of the legal doctrine on which they turned, nor to illustrate them by frequent references to other codes, to which, nevertheless, he was perfectly competent by the variety as well as by the extent of his studies. His preference was rather to deduce the sentence he was about to pronounce, as a logical consequence from some proposition of law which he had previously stated and settled with great brevity. No Judge was ever more free both in mind and style from

every thing like technicality. He never assigned a technical reason for any thing, if another were at command, or if not, without sustaining the artificial reason by an explanation of its grounds. At the same time his knowledge embraced all the refinements of the law, and he took an obvious satisfaction in showing their connexion with substantial justice.

His judgments are further distinguished by perspicuity, precision, and singleness.

No careful reader was ever at a loss for the meaning of the Chief Justice, and his whole meaning. His language is transparent; you see through it, instantly, the purpose of the writer. There is no involution, no parenthesis, no complication. Every thing is direct, natural, and explicit. His style without being dry, and possessing upon proper occasions such embellishments, even, as a severe and critical taste would permit, is made up, in general, of terms and phrases so entirely ascertained in their meaning, as to defy the extraction of a double sense,—an excellence of the very first order in judicial compositions. This precision, was the result of an accurate adjustment of the argument before he committed it to paper. His opinions, such as they appear in the earliest reports of them, and I presume the same of the whole, were published from the first draught, in which it was rare to find either erasure or interlineation; and I recollect no instance in which he was asked by counsel, or induced by his own review, to give an explanation of them. This was, indeed, a natural consequence of that singleness, to which I have alluded as a striking feature of his judgments. He paid little respect to what are called *dicta*, opinions collateral to the matter in judgment, from whatever quarter they might come. He pronounced none himself. His concern was with the point in issue, and nothing else; and he kept his eye on that, as a mariner does upon the Pole-star.

All his opinions are, moreover, remarkable for their admirable common sense, and their adaptation to the common understanding. There is no reaching after what is recondite, or abstruse,—no affectation of science. The language of the law, as he uses, is vernacular, and his arguments are the most simple that the case will bear. They are not an intricate web, in which filaments separately weak obtain strength by their union, but a chain, whose firmness arises from the solidity of its links, and not from the artifice of their connexion.

But that quality which exalts his judgments the most in the estimation of the public, is the ardent love of justice which runs through them all. His appetite for it was keen and constant; and nothing could rouse his kind and courteous temper into resentment, more than a deliberate effort to entangle justice in the meshes of chicanery. The law was his master; he yielded implicit obedience to its behests. Justice was the object of his affections; he defended her with the devotion of a lover. It is the high praise of his administration, and of the profession too, that the occasions were rare in which his efforts did not bring them into harmonious co-operation.

Is it not worthy of remark, that judgments such as these, which enjoyed universal respect, were nevertheless, free from every thing like pretension? Chief Justice Tilghman could have done as much with this Bar, by the force of his authority, as any Judge that ever sat in his seat. His investigations were known to be so faithful, his reason-

ings so just, and his convictions so impartial, that there would have been a ready acceptance of his conclusions, without a knowledge of the steps which led to them. He asked however, for submission to no authority, so rarely as to his own. You may search his opinions in vain, for any thing like personal assertion. He never threw the weight of his office into the scale, which the weight of his argument did not turn. He spoke and wrote as the minister of reason, claiming obedience to *her*, and selecting with scrupulous modesty such language, as while it sustained the dignity of his office, kept down from the relief in which he might well have appeared, the individual who filled it. Look over the judgments of more than twenty years, many of them rendered by this excellent magistrate after his title to unlimited deference was established by a right more divine than that of Kings, —there is not to be found one arrogant, one supercilious expression, turned against the opinions of other judges, one vain glorious regard toward himself. He does not write as if it occurred to him, that his writings would be examined to fix his measure, when compared with the standard of great men, but as if their exclusive use was to assist in fixing a standard of the law.

It is to all these qualities that Chief Justice Tilghman owed the confidence of his brethren on the Bench. It does not occur to me at present, that his opinion at *Nisi Prius* or on the Circuit was ever overruled, nor that his judgment in *Bank* was made ineffectual by a majority of the Court, except in a single instance; and it will not be deemed offensive to say, that when the same question shall recur, it will probably be considered without any decisive influence from this unsupported case.

If the common law were a science, in which the mind of a Judge might speculate without impediment, as in some others, it would be natural to ask, what new principles he has added to the code, or what new combinations he has made to increase its vigour. It is such an inquiry that imparts interest to the biographical notices of men, who have been eminent in Physics, in the higher branches of the Mathematics, and emphatically of such as have been distinguished actors in the formation of political Constitutions, or of new codes of law. There is a freedom and expansiveness in some parts of science, that even imagination may be invited to attend upon genius as it explores them; and the Legislator especially, or the founder of new governments, is so little restrained in his movements, that the personal character of the individual becomes the pervading soul of the work, and looks out from every part of it. But the law, as a practical science, depends mainly for its value, upon retaining the same shape and nearly the same dimensions from day to day. A speculative, inventive, imaginative Judge is a paradox. No one can reasonably ask what a Judge has invented or devised, or even discovered. His duty and his praise are in the faithful administration of a system created to his hands; a system of principles, the just development of which affords sufficient scope for genius, without destroying what is established, or innovating in the spirit of a law-giver. If ever his labours approach the merit of discovery, it is when he reforms or brings to light what had a previous existence, but had been perverted or obscured.

In some particulars of great interest to the profession, the late Chief Justice had the merit of relieving our code from perversion and ob-

security of this description. He has certainly reinstated a statute of indispensable use, and which was imperceptibly giving way to judicial legislation here, as it has thoroughly done in England, the Statute of Limitations in actions of assumpsit. On this subject he distinctly led the way in Pennsylvania; and in every particular in which he was not restrained by authority, he has brought our Courts back to the true interpretation. He has, as it were, reclaimed this resting place for the unfortunate, from an irruption of the ocean.

He led the way also, and has resolutely persevered, in opening the large rivers of this Commonwealth, to the great work of public improvement, by rejecting the inapplicable definitions of the English common law, which would have subjected them to the claim of the riparian owners.

He has followed up that work which his father is said to have begun, by giving the force of his mind and influence to the establishment of such rules, as make the Land Office system harmonize with every other part of our code.

But his great work, that at which he laboured with constant solicitude, but with scarcely a passing hint that he was engaged in it, is the thorough incorporation of the principles of scientific equity, with the law of Pennsylvania, or rather the reiterated recognition by the Bench, that with few exceptions they form an inseparable part of that law.

The distinction between law and equity is well understood by the Profession, but difficult to explain to popular apprehension. It is a great but prevalent mistake, to suppose that a Court of Equity is the reproach of the common law, whereas it is its praise, at least the praise of its illustrious origin. The Common Law, being originally the law of freemen, of that Saxon stock from which is derived the freest race upon earth, left nothing to the discretion of the Judge or the Monarch. It was itself the great arbiter, and ruled every question by principles of great certainty and general application. In its earliest day, a day of comparative simplicity, its general principles and forms embraced and adjusted almost every transaction: and when they did not, the authority of the Common Law Courts was legitimately extended by new writs devised in the then incipient Chancery. The refinements of later times, the invention of uses, and afterwards of trusts, the complications of trade, the defects incident to the multiplied operations of men, all tended to produce controversies which the Judges of the Common Law could not, consistently with their integrity and the integrity of their rules, adjust with perfect effect; and hence the development of the Court of Chancery. It is a great misconception of that court, to suppose that it overturns the Common Law. Equity is a part of the Common Law; and a Court of Chancery is the homage paid by a free Constitution to the integrity of the Courts of Common Law. It is the handmaid of those Courts. It restrains dishonest men from applying the general rules of those tribunals to cases which they ought not to embrace,—it extends to the upright the benefit of a rule of those Courts, of which a defect in circumstance deprived them,—and it attains its purposes by a process, between parties, and through a method of relief, almost necessarily different from those of the Courts of Common Law, but in perfect analogy with what the rules of those Courts effect where they proper-

ly apply. It is no more the reproach of the Common Law, that it has a department of Equity, than that it has a department of Admiralty Law, or of Ecclesiastical Law. There is no more reason why the original constitution of the Courts of Common Law should be destroyed, by blending with their principles and practice, the rules of a Court of Chancery, than by uniting with them the rules of the Admiralty. It is a question of having two Courts to execute different parts of the same system, instead of one; and the experience of England, and of most of these States, is better than volumes, to show, that the purity and vigour of both law and equity, are maintained by preventing their intercourse in the same tribunal. That their separation is unfriendly to the people, is refuted by the great examples of Maryland, Virginia, and New York, and by the example of all the States in their Federal capacity.

It is the misfortune of Pennsylvania that the want of a Court of Chancery has left her tribunals no alternative but that of attempting this difficult incorporation. Her Chancery history is short and striking.

There was no such Court among the institutions of William Penn, or of his day. That this was the consequence of a jealousy of the principles and practice of that Court entertained by the people, is not indicated by their early juridical history. It was more probably owing to a question connected with the introduction of the Court, and under the influence of which it met an early fate,—in whom, according to the constitutional law of that day, the office of Chancellor ought to vest, and whether it could be legally executed except by one, who, under the great seal of England, acted as the king's representative. The prerogative lawyers of the colony held the negative of that question; yet the alleged necessity for the Court was such, and such the attachment to both its forms and principles, that the Legislature, by a mere resolution, requested Sir William Keith, to hold a Court of Chancery, and it was accordingly opened under the proclamation of that Governor, in August 1720. During the rule of a less popular Governor in 1736, the organization of the Court was denounced by the assembly as a violation of the Charter of Privileges, and at the same session a Bill was sent up for the approbation of Governor Gordon, establishing Superior and Inferior Courts of Equity in the ordinary way. The prerogative objection recurred, it became a party question, the Bill was not approved, Chancery powers were no further exercised, and Pennsylvania lost the system, because her Governors and representatives could not agree by whom the office of Chancellor should be held.

It may be supposed that the circles of this party feud grew larger as they advanced, and that they finally encompassed the Court itself. Such probably was the case at the commencement of the revolution. Scientific Equity fell under general proscription, and with some few exceptions was made to give place to a spurious equity, compounded of the temper of the judge, and of the feelings of the jury, with nothing but a strong infusion of integrity, to prevent it from becoming as much the bane of personal security, as it was the bane of science.

It was to expel this usurper, that the days and nights of Chief Justice Tilghman were devoted,—a work suggested it is true by that distinguished predecessor to whom he owed his office, but consummated

by himself and his colleagues, to whom we owe a debt not to be acquitted, for having fully established the principles of methodised and scientific equity in their just sway, as a part of the common law of the land.

He achieved this work, at the same time, without the slightest innovation upon legal forms, upholding them on the contrary as the only instruments for the administration of equity, except where the Legislature otherwise directs. No one ever knew him usurp a power of any kind, still less a power of Chancery, of which, his very affection for the system seemed to make him apprehensive. He has expressed the opinion, that the Legislature would, at no distant day, find it expedient to provide for Trusts, as well as for other subjects of Chancery jurisdiction; but, in the mean time, he has taught us how to clothe a large body of equity principles in the drapery of the law. In those cases, in which Equity consists in the very methods of her administration, the Chief Justice looked for final relief from the representatives of the people; and he waited patiently, and was content that they should wait, the instruction of time. Is the hope vain, that the opinion of this pure and enlightened Judge, may be received instead of that instruction?

Let it not be supposed, however, because he was deeply imbued with the principles of Equity, that he was therefore latitudinarian. His Equity was as scientific as his Law. It was the Equity of the Hardwicks, the Thurlows, and the Eldons of England, of the Marshalls, the Washingtons, and the Kents of the United States;—an equity without discretion, fixed as the principles of the Common Law, and like it, worthy of the freemen of whose fortunes it disposes.

It is in the points already noticed, without referring to a mass of invaluable adjudications on particular questions of law, that the late Chief Justice has made an impression upon the science in this commonwealth. His influence upon it, cannot be forgotten. He will not be remembered merely as an upright and able Judge, who has maintained the dignity of his profession and office, but as one who has stamped his peculiar principles and modes of thought upon the code, and who has imparted to it as much of the philosophical cast of his own mind, as could with safety be carried into a science, that is as well a science of authority, as it is of principles.

In the department of Penal law he was relieved by his office from frequent labours, although he annually presided in a Court of Oyer and Terminer for this county. His knowledge of this branch of the law was extensive and accurate; his judgment in it, as in every other, was admirable. His own exemption from moral infirmity, might be supposed to have made him severe in his reckonings with the guilty; but it is the quality of minds as pure as his, to look with compassion upon those who have fallen from virtue. He could not but pronounce the sentence of the law upon such as were condemned to hear it; but the calmness, the dignity, the impartiality, with which he ordered their trials, the deep attention which he gave to such as involved life, and the touching manner of his last office to the convicted, demonstrated his sense of the peculiar responsibility, which belonged to this part of his functions. In civil controversies, such excepted as by some feature of injustice demanded a notice of the parties, he reduced the issue pretty much to an abstract form, and solved it as if it had been

an Algebraic problem. But in criminal cases, there was a constant reference to the wretched persons whose fate was suspended before him; and in the very celerity with which he endeavoured to dispose of the accusation, he evinced his sympathy. It was his invariable effort, without regard to his own health, to finish a capital case at one sitting, if any portion of the night would suffice for the object; and one of his declared motives was to terminate, as soon as possible, that harrowing solicitude, worse even than the worst certainty, which a protracted trial brings to the unhappy prisoner. He never pronounced the sentence of death without severe pain; in the first instance it was the occasion of anguish. In this, as in many other points, he bore a strong resemblance to Sir Matthew Hale. His awful reverence of the great Judge of all mankind, and the humility with which he habitually walked in that presence, made him uplift the sword of justice, as if it scarcely belonged to man, himself a suppliant, to let it fall on the neck of his fellow man.

My brethren, we may be permitted to say, that these properties of a great Judge, were adorned by manners, the combined effect of a benevolent heart, and of a fine education, which made his intercourse with the Bar, and theirs with him, an unbroken circle of affection and respect. The practice of the law is not without its trials to a Judge of the happiest temper. The efficiency of the advocate, in some causes, depends upon his giving the rein to his ardour, and in moving with a velocity which kindles others as well as himself. These rapid movements are unfriendly to a nice selection of phrases, and to that deference to the opposing sentiments of the Court, which the due order of a judicial tribunal demands. It argues little against the Judge or the advocate, that in cases like these, there should be momentary lapses of the temper. But whose memory is so unfaithful as to record one such incident in the judicial life of Chief Justice Tilghman? He knew the respect of the Bar for him to be so cordial, that he never suspected offence; and they knew his integrity and fidelity to the law to be such, that they never placed his judgment on any occasion, to the account of prejudice, partiality, or impulse. The reign of sound law and impartial justice in the Supreme Court of the State, has therefore been the reign of courtesy and kindly feelings between the Bench and the Bar; and though dead, he will continue to speak as if living, in favour of this natural and delightful union.

Upon the whole, his character as a Judge, was a combination of some of the finest elements that have been united in that office. Among those which may be regarded as primary or fundamental, were a reverential love of the Common Law, and a fervent zeal for justice, as the end and intended fruit of all law. The former was enlightened by laborious study in early life, the latter was purified, like the constitution of his whole mind, by a ceaseless endeavour to ascertain the truth. In the service of these exalted affections, he never faltered. His effort in every cause was to satisfy them both; and by attention to the researches of others, patient inquiry for himself, and a judgment singularly free from disturbance of every mind, he rarely failed to attain his object. Other Judges may have had more learning at immediate command,—none have had their learning under better discipline, or in a condition more effective for the duty on which it was employed. His mind did not flow through his opinions in a stream

of exuberant richness, but its current was transparently clear, and its depth was never less than the subject required, however profound. He was moreover equal to all the exigencies of his office, and many of them were great, without any such exertion as appeared to disturb the harmony, or even the repose, of his faculties; and he has finally laid down his great charge, with the praise of being second to none who have preceded him in it, and of leaving his countrymen without the expectation or the desire of seeing him surpassed by those who shall follow him.

The judicial faculties and virtues which I have thus endeavoured to sketch, could never have been the companions of disorder in the mind, the affections, or the life of the individual. My Lord Coke has made to the aspiring student of the law, this striking appeal, too flattering perhaps, except while the venerable portrait of the late Chief Justice is still before us: "Cast thine eye upon the sages of the law that have been before thee, and never shalt thou find any one that hath excelled in the knowledge of these laws, but hath drawn from that divine knowledge, gravity, and integrity." He pronounces this knowledge to be irreconcilable with a loose and lawless life, and gives the result of his large experience, that he had never seen any man of excellent judgment in the Common Law of England, "but was withal, being taught by such a master, honest, faithful, and virtuous." The Chief Justice was not only thoroughly taught by this master, but he came into the school accomplished in elegant learning; and long before he left it, there was associated the training of another school, worthier far than the Common Law, of the exalted eulogy of Sir Edward Coke.

His early education, it has been remarked, was excellent. He was an accomplished Latin scholar, but, to his own regret, had suffered his Greek to fall away by desuetude. The literature of the former language, he kept constantly fresh in his mind. His memory was stored with beautiful Latin, which he has been heard to repeat as it were to himself, when the occasion recalled it, and his modesty did not care to pronounce it aloud. On all his Circuits and journeys into the districts of the Supreme Court, his companions were the Bible, a Latin author, and some recent treatise of distinction in the law. Upon the last that he ever made, he refreshed his recollections of the Pharsalia. It is perhaps no idle fancy to suppose that he may have then read, with almost a personal application, the prophetic appeal of the Spectre to the race of Pompey:

——— Veniet quæ misceat omnes
Hora duces. Properate mori——

Such a name and such an example, are of great efficacy in the inquiry concerning the fittest basis of liberal education. All the faculties of his mind were thoroughly developed,—he accumulated large stores of knowledge,—he brought them into daily use,—he reasoned accurately,—he conversed elegantly,—his taste was refined,—the pleasures which it brought to him were pure,—his imagination was replete with the beautiful forms of ancient poetry,—he was adequate to the functions of one of the most exalted offices,—he knew little of the natural sciences,—and his education was such as has been described. It would

be unjust to him, however, to say that he undervalued knowledge of any kind, and least of all that knowledge which is opening every day to the world, and to this part of the world especially, new sources of wealth, and new proofs of the wisdom and beneficence of Deity. On the contrary, with that diffusive liberality for which he was conspicuous, he gave his counsel and his money to every plan for increasing this species of knowledge; but it cannot be asserted of him, that he recommended it in any of its branches, as an instrument for unfolding the faculties of youth. He regarded these sciences as treasure for accumulation, after education had performed its office. For the great work of training the minds of young men to liberal pursuits, and to the learned professions, his opinion was anchored upon the system, by which he had been reared himself,—the system of the American Colleges.

While the Chief Justice continued his intercourse with the learned ancients, he found leisure in the intervals of office, for the literature of his own language, in which he was extensively versed, and for which he possessed the keenest relish; and it is to these two sources that he owed the purity of his style, where nothing coarse or vulgar ever appeared, and which, without being affected or elaborate, was remarkable for the absence of all words of questionable authority.

His moral qualities were of the highest order. It has been said, that the panegyrists of great men can rarely direct the eye with safety to their early years, for fear of lighting upon the traces of some irregular passion. But to the subject of this discourse, may with justice be applied, the praise of the Chancellor D'Aguesseau, that he was never known to take a single step out of the narrow path of wisdom, and that although it was sometimes remarked he had been young, it was for the purpose not of palliating a defect, but of doing greater honour to his virtues. Of his early life, few of his cotemporaries remain to speak; but those few attest, what the harmony of his whole character in later years would infer, that his youth gave presage by its sobriety and exemplary rectitude, of all that we witnessed and admired in the maturity of his character. It is great praise to say of so excellent a Judge, that there was no contrariety between his judgments and his life,—that there was a perfect consent between his public and his private manners,—that he was an engaging example of all he taught,—and that no reproach which, in his multifarious employment, he was compelled to utter against all the forms of injustice, public and private, social and domestic,—against all violations of law, from crime down to those irregularities at which, from general infirmity, there is a general connivance,—in no instance, did the sting of his reproach wound his own bosom. Yet it was in his life only, and not in his pretensions, that you discerned this his fortunate superiority to others. In his private walks he was the most unpretending of men. He bore constantly about him those characteristics of true greatness, simplicity and modesty. Shall I add, that the memory of all his acquaintance may be challenged to repeat from his most unrestrained conversation, one word or allusion, that might not have fallen with propriety upon the ear of the most fastidious delicacy.

His manners in society, were unusually attractive to those who were so fortunate as to possess his esteem; and they were the reverse to none, except those who had given him cause to withhold it. Their

great charm was sincerity; and though unassuming and retired, they never failed to show the impress of that refinement in which he had passed his life.

The kindness of his nature appeared in the intercourse that he maintained with his fellow citizens, notwithstanding the claims of his station. He probably entertained Mr. Burke's opinion, that *as it is public justice that holds the community together, the Judges ought to be of a reserved and retired character, and wholly unconnected with the political world.* He certainly acted up to all that the sentiment asserts; and he found the benefit of it, the community did also, in a ready submission to those judgments, more than one, in which a suspected infusion of party would have been a disturbing ingredient. No one who knew him in private life, had however any reason to doubt his opinions, when the occasion fitly called for their expression. Not deeming it discreet to meet his fellow citizens in those assemblies where either politics or their kindred subjects were to be discussed, he seized with the more avidity, such occasions of intercourse, as were presented by meetings for public improvement, for philosophical inquiry, or the cultivation of literature; and in particular he attended with great interest to the concerns of the American Philosophical Society, of which he was chosen President, on the death of Dr. Patterson, in the year 1824, and to those also of the Athenæum, of which he was the first, and during his life, the only President:—the Trustees of the University of Pennsylvania rarely missed him from his seat, or the United Episcopal Churches, of this City, from their Vestry, as the Warden of his venerable friend and pastor Bishop White. It was in this way that he diminished the distance to which his office removed him from society; keeping however a constant eye upon that office, even when he moved out of its orbit, and taking scrupulous care, that no external contact should be of a nature to disturb his movements when he returned to it.

It was upon an occasion when a very delicate question agitated the country, that he mentioned to a friend a transaction in his life, which, although in a certain sense public in its character, is even at this time not extensively known. His reason for adverting to it, illustrates in a striking manner his deference to the demands of his station; while the passage in his life to which it refers, discloses his sentiments upon the embarrassing question of negro slavery: a question however upon which, in some of its practical bearings, he thought it an act of infinite rashness to judge other men, and in regard to which he almost concealed his own decided proceeding, lest it should appear to reproach the judgment of his kinsmen and friends.

Having been asked to take part in a public meeting in this city upon what has been called the Missouri question, he thought it expedient to decline. "My office," he said, "compels me often to decide upon this irritating question of slavery; and it is not expedient to take part in a public discussion, that might bring my impartiality into doubt. No one who knows the arrangement that I have made with the slaves which belonged to me, will doubt my fervent wish to see the evils of this institution mitigated, and, if possible extinguished." The arrangement was an instrument executed on the 24th of April, 1811, by which he emancipated four of his slaves immediately, nine others in successive periods of from three to seven years, and the residue, twenty-five in

number, together with their issue, on the first day of January after they should respectively attain the age of twenty-eight years. There was but one prescribed impediment to this emancipation,—unlawful absence from duty, wilfully or by imprisonment for crime; in which case the party's freedom was deferred for treble the term of his absence. The benevolent proprietor lived to see this emancipation attained by twenty, and he has secured its benefit to those that remain. He has secured it in the best way, by making it the reward of fidelity and virtue, and by so regulating it both as to time and numbers, as to give its objects the best chance of establishment in the community.

The temper of the Chief Justice was singularly placable and benevolent. It was not in his power to remember an injury. A few days before his death, he said to two of his friends, attendant upon that scene, "I am at peace with all the world. I bear no ill-will to any human being; and there is no person in existence, to whom I would not do good, and render a service, if it were in my power. No man can be happy who does not forgive injuries which he may have received from his fellow-creatures." How suitable was this noble conclusion to his exemplary life! What a grace did this spirit impart to his own supplications! This was not a counterfeit virtue assumed, when the power to retaliate was wasted by disease. It was not the mere overflow of a kindly nature, unschooled by that divine science which teaches benevolence as a duty. It was the virtue of one, who, in his eulogium upon his eminent friend Dr. Wistar, who had filled the Chair of the Philosophical Society thus made known the foundation on which his benevolence was built. "Vain is the splendour of genius without the virtues of the heart. No man who is not *good*, deserves the name of *wise*. In the language of Scripture, folly and wickedness are the same; not only because vicious habits do really corrupt and darken the understanding, but because it is no small degree of folly to be ignorant, that the chief good of man is to know the will of his Creator, and to do it."

It was under the influence of this sentiment, that his fortune became a refuge to the unfortunate, far more extensively than his unostentatious manners imported. Notwithstanding the panoply which protected him from the assaults of this world, he was like the feeblest of his race, naked and defenceless against the dispensations of Heaven. His bosom suffered many and deep lacerations; but they had the propitious effect of opening his heart to mankind, instead of withering and drying up its affections. He was gentle, compassionate, charitable in many of the senses that make charity the first of virtues; and long after his leaves and branches were all torn away, there was more than one that reposed in the shade of his venerable trunk. His closing years finely illustrated the remark, that the heart of a good man is like a good soil, which is made more fertile by the ploughshare, that tears it and lays it open,—or like those plants which give out their best odours when they are broken and crushed.

An interesting record which this venerable man has left behind him, acquaints us with many of his most private thoughts, and presents him in a relation which no man can renounce, and which, when duly observed, is the appropriate light wherein to behold an eminent Judge, the relation of man to his Creator.

His birth day, the 12th of August, was habitually appropriated to

the review of the past year, to self-examination, and to intercourse with God; and it will not be deemed irreverent in us, the only children he has left, to cast an affectionate eye upon this record, and to draw encouragement and counsel, as well as increased veneration for his character, from the touching disclosure it makes of his fortitude, resignation, and piety.

The first of the series which has been found, begins on the 12th of August, 1804, when he completed his forty-eighth year. He says—"my health is good, my constitution unimpaired, but I am deeply impressed with the uncertainty of life. Let me prepare to follow the numerous friends who have left this world before me."—"The last stage of my residence on earth is approaching. Time is precious. I must not suffer it to be wasted in indolence, or thrown away on light amusements. I have endeavoured during the course of this day to strengthen my mind with virtuous resolutions, and I hope my endeavours have not been useless." He then repeats the resolutions he had formed for the government of his life, among which is that of "letting no day pass without prostrating himself before the Supreme Being, in meditation, thanksgiving and prayer;" and he concludes his memorial by offering, as he expresses it, "with a grateful heart, his unworthy thanks to the almighty and merciful God, for past favours, far exceeding his merits," and by "imploring with all humility, that he would graciously assist his weak endeavours to keep the resolutions he had made."

He continues this review for several years, during which his strain is that of gratitude for constant benefactions: but in the year 1817, the clouds gathered around him, the countenance of his beneficent Creator seemed to be withdrawn, and the night of his old age was approaching, with the promise of but one feeble and ill-assured ray to relieve it from total darkness. He had been one of ten brothers and sisters, to all of whom he had borne the tenderest affection. He had been a husband, enjoying for a short time the happiness of that sacred relation. He had been the father of one child, devotedly loved for her intelligence, filial affection, and piety. Mark with what a celestial temper, if I may so speak, he records the flight of all these blessings. "I have now attained the age of sixty one, and have survived parents, brothers, sisters, wife, and child. But few of my dearest connexions remain in this world. May this reflection induce me so to use the short remainder of my life, as may recommend me to thy favour, and procure me the happiness of once more meeting my departed friends, according to my confident hope. Lord thou hast taken away the child which thou hadst given me. I murmur not. Blessed be thy name."

Before the 12th of August, 1820, that feeble ray which was promised to his declining days, was extinguished. The only child of his only daughter was taken from him. Yet observe, how the light of the divine philosophy shone inward, and dispelled the gloom in which unassisted man would have sunk to despair. "Great God, during the last year, thou hast thrown me on the bed of sickness, and raised me up from it. Thou hast taken from me, my last earthly hope. I submit to thy providence, and pray that thou will grant me fortitude under all my afflictions. I am sure that whatever is ordained by thee is right. May I never forget that thou art always present, the witness and judge of my actions and thoughts. My life is hastening to an

end. May I, by thy gracious assistance, so employ the remainder of it, as not to be altogether unworthy of thy favour."

On the last anniversary that he ever saw, he begins his paper with the prophetic declaration, "this day completes my seventieth year, the period which is said to bound the life of man. My constitution is impaired, but I cannot sufficiently thank God, that my intellects are sound, that I am afflicted with no painful disease, and that sufficient health remains to make life comfortable. I pray for the grace of the Almighty, to enable me to walk during the short remnant of life in his ways. Without his aid I am sensible that my efforts are unavailing. May I submit with gratitude to all his dispensations, never forget that he is the witness of my actions and even of my thoughts, and endeavour to honour, love, and obey him, with all my heart, soul, and strength."

It is no longer wonderful that this venerated man performed his duties to universal acceptance, when we discern the spirit, better far than the *genius* of Socrates, from which he asked counsel. The ancients would have said of him, that he lived in the presence of all the Deities, since prudence was never absent from him. The holders of a better faith must say, that it was to no poetical deity, nor to the counsels of his own mind, but to that "grace" which his supplications invoked, that he owed his protection from most of the lapses to which fallible man is subject.

That "remnant of life" to which his last memorial refers, unfortunately for us, was short as he had predicted; but he walked it as he had done all that went before, according to his devout aspiration. He continued to preside in the Supreme Court with his accustomed dignity and effect, until the succeeding winter, when his constitution finally gave way, and after a short confinement, on Monday, the 30th of April, 1827, he closed his eyes for ever. It will be long, very long before we shall open ours, upon a wiser judge, a sounder lawyer, a riper scholar, a purer man, or a truer gentleman.

The *private life* of this eminent man, was the reflection of an unclouded mind, and of a conscience void of offence; and such external vicissitudes as marked it, did but ripen his virtues for their appropriate scene hereafter. The praise of his *public career*, is that it has been barren of those incidents which arrest the attention, by agitating the passions, of mankind. If it has grown into an unquestioned truth, that the poorest annals belong to those epochs which have been the richest in virtue and happiness, it may well be admitted that the best Judge for the people, is he who imperceptibly maintains them in their rights, and leaves few striking events for biography.

His course does not exhibit the magnificent variety of the Ocean, sometimes uplifted to the skies, at others retiring into its darkest caves,—at one moment gay with the ensigns of power and wealth, and at another strewing its shores with the melancholy fragments of shipwreck;—but it is the equal current of a majestic river, which safely bears upon its bosom the riches of the land, and reads its history in the smiling cities and villages, that are reflected from its unvarying surface.

Such is the praise of the late Chief Justice Tilghman. He merited, by his public works and by his private virtues, the respect and affection of his countrymen; and the best wish for his country and his office is, that his mantle may have fallen upon his successor.

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one-third part of the mill yard, and one-third part of the privilege of the water, and a sufficient quantity of land to make in all two-thirds of five acres, bounded, &c., to be so surveyed as not to include the defendant's dwelling-house and barn; and the said plaintiff to remove a certain grist mill adjoining the said saw mill within the term of three months: *Held*, that on the face of the award it was not void, and that whether it was invalidated or supported by the parol evidence given by the parties, the jury were to decide.

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Where a charter has been obtained by means of fictitious subscriptions for part of the stock, and a fraud has been committed on a real subscriber, by which he has sustained or might sustain injury, no action can be maintained against him by the corporation, for the amount of his subscription; but where such subscriber has accepted the charter, and by his own acts put it in operation, he cannot avail himself, as a defence, of the fact, that part of the stock was fictitious. *Centre and Kishacoquillas Turnpike Road Company v. McConaby.* 142

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DISTRESS.

See ACTION, 1.

1. The landlord's right to distrain at the end of the year, is not affected by an agreement in the lease, that he may re-enter if the rent be unpaid at a stipulated period after the expiration of the year. *Smith v. Meenor*. 375

DOWER.

1. Where, in an action of dower, the defendant pleaded defectively an agreement before marriage in lieu of dower, and a recovery thereon by the plaintiff, and the plaintiff replied, denying the facts set forth in the plea, and concluding to the country, and the defendant demurred to the replication, and the court below entered judgment

for the plaintiff on the demurrer: *Held*, that in this judgment there was no error.

In an action of dower, the record of the suit, founded upon an alleged agreement entered into before marriage, upon which a recovery was had, is not evidence for the defendant, without producing the agreement itself, or proving its loss and contents.

But *it seems*, that, if the loss of the original agreement were proved, the recital of it in the record, by the plaintiff, might, as far as it went, be evidence against her of the contents of the agreement.

If, in an action of dower, the jury find "for the plaintiff, her dower as stated in the declaration," and the court thereupon enter judgment that a writ of seisin and inquiry of damages issue, the plaintiff may release all but the judgment to recover seisin, and that may stand. *Barnett v. Barnett*. 51

EJECTMENT.

See WITNESS.

ERASURE.

See DEED, 1. DOWER, 1.

ERROR.

1. A writ of error does not lie on the order of the court below admitting a judgment against the plaintiff, assigned to the defendant, to be set off against the judgment obtained in the suit. *Wellock v. Cowan*. 318
2. In a criminal case, the writ of error quashed because the *allocatur* was obtained, and the writ issued, before sentence passed. *Marsh v. The Commonwealth*. 319
3. A decision of the court below, that the plaintiff's counsel shall conclude, in addressing the jury

on the trial, is not the subject of a bill of exceptions and writ of error. *Robeson v. Whitesides*.

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4. Where there is no variance or contradiction in the testimony, but it is all consistent and express as to the facts, if the judge in charging the jury express the legal result of the whole evidence, he is not to be considered as taking the facts from the jury. *Johnston v. Gray*.

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EVIDENCE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1. CORPORATION, 1. DEED, 1. WITNESS, 1. RECORD, 1. DAMAGES, 1. ACCOUNT, 1.

1. Where a record has been given to the court and jury without objection in evidence, it is error to refuse to permit it to go out with the jury. *Hendel v. Berks and Dauphin Turnpike Road Company*.
2. In an action of covenant upon an alleged warranty of title, the defendant may, as the first link in his defence, give in evidence a warrant granting the land, "provided it is not in our manor of *Springettsbury*," notwithstanding the land does lie within the manor. *Christine v. Whitehill*.
3. The book of a tailor to whom cloth is delivered to make a garment, and who swears, that it is his book of original entries, and that the several entries were made at the time each bears date, but states that after he had cut out the work, and delivered it to the journey-men who lived in the house with him, he made the charge, and that this was the manner in which he kept his books, is admissible in evidence. *Kaughley v. Brewer*.

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4. The declarations of a party at the time of making a settlement are evidence of the intent with which he entered on the land.

Bennett v. Hethington. 193

5. In a question whether the plaintiff had paid certain purchase money, the defendant gave evidence to show that the plaintiff was insolvent; the plaintiff, to rebut this, offered in evidence the assessment of lands in the names of himself and H., and then offered the will of H., mentioning that lands had been sold by him to the plaintiff, declaring that his (H's.) share of the money due, was one hundred pounds, and referring to the plaintiff's interest in another part; held that it was improperly admitted.

Pipher v. Lodge. 214

6. The minute of the prothonotary of the acknowledgment of a deed by the sheriff, is not evidence to prove the deed, if the non-production of it is in no way accounted for. *Lodge v. Berrier*.

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7. The plaintiff cannot, by joining in one ejectment two defendants who hold by separate titles, read in evidence depositions taken in a former suit, in which one only of these defendants was party; especially if the land in controversy in the different suits is not the same. *Walker v. Walker*.

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EXECUTION.

1. If under a judgment against the sheriff and his sureties, a levy be made upon the goods of the sheriff which are released by the agreement of the plaintiff, the sureties are discharged to the amount the goods would have sold for at sheriff's sale, after deducting the expenses of the sale. *Commonwealth v. Haas*.

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EXECUTORS AND ADMINISTRATORS.

See DEATH OF PARTY. PLEADING,

4. AMENDMENT, 3.

1. A general verdict for the plaintiff, on the pleas of *non assumpsit*, *plene administravit*, and debts of a higher nature, is, substantially, a finding of assets to the amount of the demand, and good. *Strohecker v. Drinkle*. 38.
2. If one of two executors, who have separately administered different parts of the testator's estate, dies, his administrator may settle a separate account of the administration of the deceased executor. *Burclay v. Morrison*. 129
3. Where the books of a deceased tavern-keeper were left with his widow, who was his executrix, held, that her co-executor was not chargeable with the book debts uncollected, though the whole amount of those debts was returned without distinction in the inventory; this being no proof that more might have been collected than was accounted for. *Ibid*.
4. Two administrators sold land of the intestate to *B.*, under an order of the Orphans' Court, for payments of debts, &c., and took a mortgage in their names as administrators for the unpaid portion of the purchase money. *B.* afterwards sold about one third of the land to *Y.*, who made improvements. He then sold the residue of the land to *G.*, and took from him two bonds, one to the administrators for the purchase money due them, and the other to himself for a further sum, with a mortgage on the portion thus last sold to secure these bonds. *B.* afterwards assigned the bond in favour of himself to *P.* *G.* declining to pay interest to the administrator on account of the

first mortgage, *B.* prevailed on one of the administrators to enter satisfaction of the mortgage to the administrators on the margin of the record, (reciting an order to that effect by the Orphans' Court, which had not been made,) and at the same time the guardian of the minor children of the intestate, acknowledged on the margin of the record the receipt of the last mortgage as sufficient security for the debt from *B.* After these transactions *P.* assigned his bond to another: the two administrators received some interest of *G.* and brought suit against him on the mortgage for other interest due. Suit was, however, afterwards brought on the first mortgage in the name of the administrators, for the use of the minor children. The court were equally divided on the question, whether the plaintiffs were entitled to recover, and the judgment of the court below in favour of the plaintiffs was affirmed. *Beltzhoover v. Darragh*. 329

5. It is no objection to the administrator's recovery of purchase money, that he had not given security in the Orphans' Court. *Dawson v. Ewing*. 371
6. If there be a judgment against four, binding their real estate, and one dies, a *scire facias* may issue against the survivors, and the executors of the deceased: and, in that case, terre-tenants may come in and defend.

The administrator with the will annexed may recover from the administrators *pendente lite* appointed on the entry of a caveat against the will, the surplus in their hands arising from the sale of the testator's real estate by execution.

In such suit, the defendants cannot contest the validity of the will.

Administrators *pendente lite*, not using the money in their hands, are not liable for interest: but if they purchase the testator's land at a sheriff's sale, give a receipt for the money, and enjoy the property, they are bound to pay interest.

There is no particular form for an executor's renunciation: it may be by letter, showing such intention, provided it be filed in the proper office. *Commonwealth v. Mateer*. 416

FEES.

1. The plaintiff is liable to the prothonotary for the price of an original writ, though charged to the plaintiff's attorney in the docket.

The prothonotary is entitled to demand the fees due in a suit conducted to judgment, though a *scire facias* thereon has issued, on which the proceedings are not terminated.

He is also entitled, where after a *scire facias*, execution has been taken out, and no return made for more than two years. *Banks v. the Juniata Bank of Pennsylvania*. 155

GUARANTY.

See LETTER OF CREDIT, 1.

1. If the obligee, upon assigning a bond, enter into a covenant with the assignee "to stand security for the payment of it," this is an engagement to pay the money on the insolvency of the obligor, provided the assignee use due diligence to obtain payment from the obligor. What is due diligence is a fact for the determination of the jury, upon the whole evidence submitted to them. *Rudy v. Wolf*. 79

HUSBAND AND WIFE.

See RECOGNIZANCE.

1. The omission to state in the certificate the acknowledgment

of a release by husband and wife, that the wife was separately examined, is cured by the act of the 3d of April, 1826. That act is constitutional. *Tate v. Stooltzfoos*. 35

INSOLVENT.

1. The omission of the words, "and generally to abide all orders of the said court," prescribed as part of the condition of the bond, to be given by a petitioner for the benefit of the insolvent laws, by the first section of the supplemental act of the 28th of March, 1820, does not vitiate the bond, as respects either the principal or sureties; and it is immaterial that the parties recite, in the introduction to the condition, that the bond was given to comply with the requisitions of an act of assembly which has been repealed. *Farmers' Bank of Reading v. Boyer*. 48

INTEREST.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3. VENDOR AND VENDEE, 3. EXECUTORS AND ADMINISTRATORS, 7.

1. A practice by a storekeeper, to balance his books at the end of each year, and charge interest on the balance of a running account, upon which there has been no settlement, is illegal. *Graham v. Williams*. 257

JUDGMENT.

See PAYMENT, 1. VENDOR AND VENDEE. MORTGAGE. VERDICT. ATTORNEY.

1. A judgment obtained against the vendor of land, after the execution of an article of agreement, but before the execution of a deed, binds the legal estate of the vendor; and, on a sale under such judgment, the sheriff's vendee stands precisely in

the situation of the original vendor, and is entitled to the unpaid purchase money, payment of which he may enforce by ejectment against the tenant. *M. Mullen v. Wenner*. 18

2. A judgment by confession for a sum to be ascertained by the prothonotary, binds the real estate of the defendant only from the time of the liquidation of the sum by the prothonotary. *Philadelphia Bank v. Craft*. 347

JUROR.

1. A tenant who holds from year to year as a cropper, is disqualified to serve as a juror in a suit to which his landlord is a party.

It is no cause of challenge to a juror that he is the brother of the counsel of one of the parties. *Pipher v. Lodge*.

2. It is no objection to a juror to serve in an ejectment for lands sold for taxes, that he was a purchaser of other lands sold at a subsequent period for taxes. *Luffborough v. Parker*. 351

JUSTICE OF THE PEACE.

See COSTS. APPEAL.

LANDLORD AND TENANT.

See DISTRESS.

LEASE.

See DISTRESS.

LEGACY CHARGED ON LAND.

See LIEN.

LETTER OF CREDIT.

1. A letter of credit under seal is not assignable, so as to enable the assignees of the person who has given credit on it, to sustain a suit in their own names. A letter of credit, authorizing credit to be given to the bearer for any sum not exceeding a cer-

tain amount, and binding the writer to pay the amount named or any less sum, as the bearer of the letter may think proper to contract, does not justify the giving of several credits at several times; and, consequently, the writer of the letter is only responsible for the first credit given. *Aldricks v. Higgins*. 212

LIEN.

1. The owner of the land is the person in whose name proceedings are to be instituted to recover the compensation prescribed by the 10th and 11th sections of the act of the 8th of March, 1815, incorporating the *Schuylkill Navigation Company*, for an injury done by the erection of dams, &c.; but if the land be charged with the payment of legacies or subject to other liens, the owner is a trustee for all who are interested, whose rights the courts will protect. *Reese v. Adams*. 40
2. Where a legacy is charged on land, the sheriff's vendee under an execution takes the land discharged from the lien of the legacy, and the legatee must look to the proceeds of sale in the hands of the sheriff, unless the land is expressly sold subject to the legacy. *Barnet v. Washebaugh*. 410

LIEN OF MECHANICS.

1. *Scire facias* upon a claim filed under the lien law against two; and award of arbitrators against both. One entered an appeal and pleaded alone. On the trial, the jury were sworn as to both, and the one who had not appealed moved the court to dismiss the jury in consequence of the mistake, which was refused. A verdict was given against both defendants, and the one who had appealed pro-

secuted a writ of error. *Held*, that he could not assign, as error, the mistake in swearing the jury.

On the trial of a *scire facias* suit, founded upon a claim filed under the lien law, the claim cannot be read in evidence to the jury.

Unless materials be furnished on the credit of a particular building, they constitute no lien upon such building, notwithstanding they may have been used in its execution. *Hills v. Elliott*. 65

LIMITATIONS.

1. After a sale of land by articles of agreement and payment of the purchase money, the vendee died, and his wife and children left the land; the vendor placed a tenant on it, and the possession continued in him and those claiming under him, twenty-one years: *held* that it was erroneous to charge the jury that the putting on the tenant was not an ouster, unless they believed that the vendor intended to commit an ouster. *Pipher v. Lodge*. 214

2. The limitation of suits for land does not run against the Commonwealth. *Bagley v. Wallace*. 245

3. Notice of title by one out of possession, to the person in possession, does not prevent the running of the statute of limitations.

The statute of limitations does not apply in cases of express trust, where the right of the *cestui que trust* and trustee makes but one title; but it applies even there, if the trustee openly denies the right of the *cestui que trust*, and it always applies to cases of implied or constructive trusts. *Walker v. Walker*. 379

MAYORS' COURT OF LANCASTER.

See CLERK.

MORTGAGE.

See VERDICT, 1. VENDOR AND VENDEE, 2. TENDER.

1. An execution upon a judgment by default, on a mortgage for the performance of a collateral act, without a previous inquiry, though irregular, is not absolutely void.

A mortgage is not discharged by a sale under a younger judgment, where the purchaser agrees to take subject to the mortgage.

Whether there was such an agreement, the jury ought to decide. *Stackpole v. Glassford*. 163

2. Ejectment lies by a mortgagee: but, on his recovery, it is error to limit the right of redemption to one year. *Bagley v. Wallace*. 245

3. M., on the 17th of February, 1813, by articles of agreement, stated he had sold to I. a tract of land, payable three hundred dollars in hand, one hundred dollars in thirty days, four hundred dollars on the 2d of April, 1815, and four hundred dollars on the 1st of April, 1816, he was to give possession on the 2d of April, 1815, M. to enjoy the right of redemption at any time before the 2d of April, 1815, and possession till then. On the same day, he made a deed to I., with a clause that if M., his executors, &c. (the word assigns being struck out,) should pay or cause to be paid to I., four hundred dollars with interest, &c. on the 1st of April, 1815, then the bargain and sale to be void. On the 17th of February, 1814, M. sold to G., who tendered I. the four hundred dollars, before and on the 1st of April, 1815: *held*,

1. That this was a mortgage from M. to I.
2. The restriction of the right of redemption to the mortgagee personally, was inconsistent with the nature of a mortgage and void.
3. The tender by G. was good, though he did not state in what capacity he tendered, whether as purchaser or agent of M. *Johnston v. Gray.* 361

NONSUIT.

1. A plaintiff who is prevented by mistake from giving any evidence to the jury, is not prohibited by the act of assembly from the right to enter a nonsuit. *Franklin v. Mackey.* 117

NOTICE.

1. Where a rule of court directs notice to be served on a party, service on the attorney is not sufficient, though the attorney, on receiving notice, makes no objection. *Gracy v. Bailee.* 126
2. If A. settles on land, and makes improvements, and obtains title, notwithstanding a notice from B., that he (B.) claimed as tenant of C., B. cannot, after a lapse of time, finding C's. title bad, set up against A. another title in himself. *Kelly v. Abers.* 281

OATH.

See CLERK.

ORPHANS' COURT.

See RECOGNIZANCE. EXECUTORS.
ADMINISTRATORS.

NUISANCE.

1. Effect of length of time, as to encroachments in public streets. *Commonwealth v. McDonald.* 390

OUSTER.

See LIMITATIONS.

PAROL EVIDENCE.

1. In an action founded upon a deed, a material part of the instrument cannot be contradicted or explained away by parol evidence, unless such part has been inserted through fraud or mistake. Nor can a deed be discharged by any declarations of the holder of it, as to what the deed does or does not contain.

But *it seems* that if the action were for deceit, in making a false assertion in the deed, the defendant might prove the circumstances under which the clause was introduced, independently of fraud or mistake. *Christine v. Whitehill.* 98

2. In debt for rent, parol evidence is admissible, to show that in making a lease for nine years, rendering rent, it was understood and agreed by all parties, that for the last nine months no rent should be payable. *Hultz v. Wright.* 345

PARTNERS.

1. Where in an action on a bond, against A. and B., evidence was given tending to show that the bond was given to indemnify the plaintiff against liability as the indorser of a note discounted for the benefit of A., B. and C. against whom a judgment was confessed by A. and B. in the name of the firm: *held*, that the record of such judgment is competent evidence for the defendants, without having previously proved a partnership between A., B. and C.

And a paper not under seal, purporting to be a release of such judgment may be given in evidence to the jury, under the plea of payment with leave, &c. *Martin v. Kaffroth.* 120

2. The declarations of a partner, not a party to the suit, are not

competent evidence of a partnership. *Ibid.*

PAYMENT.

1. In a feigned issue between two judgment creditors, to try their right to the proceeds of a sheriff's sale, the one may show by parol evidence that the judgment of the other was satisfied by an execution issued, and levy and payment of money to him, though the execution was not returned.

The constable by whom the execution was served, is a witness to prove these facts. *Johnson v. Ramsay.* 115

PAYMENT WITH LEAVE.

See CHANCERY, 1.

1. In an action on a single bill, given for land sold, the obligor may give in evidence judgments against the grantor, previous to the deed under which the land has since been sold; whether the clause of warranty in the deed be general or special. *Christy v. Reynolds.* 258
2. The vendee of land, in a suit for the consideration money, may defalk the amount paid by him for existing incumbrances: but he is liable to the vendor for any balance beyond that. *Tod v. Gallagher.* 261
3. If the defendant, to prove failure of the consideration of the note on which suit is brought, gives evidence that he did not receive the alleged consideration, the plaintiff may show by parol evidence, that the real consideration was different from that alleged by the defendant, and that the defendant received it. *Packer v. Hook.* 327
4. In a suit for the purchase money of land sold by an administrator, under an order of the Orphans' Court, where the title is fully set out in the petition

of the administrator, the purchaser cannot set up a defect of title as a defence. *Dawson v. Ewing.* 371

PENALTY.

See ARBITRATION.

PLEADING.

See AMENDMENT. DOWER, 1. VERDICT..

1. Indebton recognizance against the surety of the sheriff, the declaration assigned as a breach, that the sheriff by virtue of an execution levied on property, and received certain sums of money which he did not pay over. It was assigned for error that no judgment was averred. Court equally divided, and judgment for the plaintiff affirmed. *Beale v. The Commonwealth.* 150
2. It cannot be assigned for error that the execution produced varied from that stated in the narr, in the Christian name of one of the plaintiffs in the execution. *Ibid.*
3. If a new declaration be filed with the leave of the court, and the defendant go on to trial on the former plea, he is considered as abiding by his former plea. *Ibid.*
4. A count against executors on their own covenant in a deed executed by virtue of a power in the will, and in execution of an agreement made by the testator, cannot be joined with one against them on the covenants of the testator. Such defect is not cured by a verdict. *Strohecker v. Grant.* 237
5. After a trial on the merits, the court will not listen to an objection that there was no replication or issue. *Thompson v. Cross.* 350

PITTSBURG.

1. Extent of *Water Street* in *Pitts-*

burg. Commonwealth v. M'Donald. 390

POSSESSION.

See LIMITATIONS.

PROTHONOTARY.

See CLERK.

RECEIPT.

1. Receipt in these words, "Received 1815, from W. B. on account of taxes and exempt fines, twenty dollars per R. A." and signed by the treasurer; W. B. was a collector of taxes, and lived more than twenty miles from the county town. *Held*, That on the face of this receipt, it ought to be taken that W. B. sent the money by R. A. *Barclay v. Morrison.* 129

RECOGNIZANCE.

See PLEADING, 1. APPEAL.

A recognizance given for the distributive shares of the heirs of an intestate, in the price of lands taken at an appraisement, is a lien only on the lands of such intestate, taken at the valuation, and not on the land of a surety in the recognizance. *Allen v. Reesor.* 10

2. The Orphans' Court decreed land of an intestate taken at the valuation, to J. K. in right of his wife (who was one of the heirs) to hold to the said J. K. and his wife, and the heirs of his wife. The wife takes only her undivided share in the land, as she inherited from the intestate.

The husband's recognizance in such case does not bind the wife's estate.

If the wife's interest in other portions of the land so decreed and taken, has been divested by decree of the Orphans' Court, or her conveyance, she cannot come upon the remaining land in the hands of a *bona fide* pur-

chaser for more than her original undivided interest. *Kean v. Ridgway.* 60

RECORD.

See EVIDENCE, 1.

1. A paper purporting to be an exemplification of the record of an Orphans' Court, stating that A. B. appeared and agreed to take certain lands at the appraisement, and containing the decree of the court assigning the said lands to him, without setting forth the other proceedings, and certified thus: "I certify, that the foregoing is a true copy taken from the original remaining in the office of the Orphans' Court of—county," is not admissible in evidence. *Christine v. Whitehill.* 98

REPLEVIN.

1. Replevin does not abate by the death of the defendant, while the suit is pending. *Keite v. Boyd.* 300

SCIRE FACIAS.

1. In a *scire facias* to revive a judgment, the terre-tenants ought to be named; if not, the sheriff should return specially, that the parties notified were the terre-tenants in fact, and whether of the lands bound by the judgment.

If all the terre-tenants are not named in the writ, it may be pleaded in abatement.

Occupiers are not terre-tenants, but those who hold the fee. *Chahoon v. Hollenback.* 425

2. Those only who claim by a conveyance subsequent to a judgment, can come under a *scire facias* as terre-tenants. *Ibid.*

SET-OFF.

See PAYMENT WITH LEAVE.

SHERIFF.

1. Wherever a writ of *feri facias*

is levied upon goods, and there is a claim of property adverse to the defendant in the execution, of such a nature as would reasonably raise a doubt or apprehension as to the title, or create a pause in the mind of a constant man, the sheriff has a right to call on the plaintiff for a reasonable indemnity. *Span-
gler v. The Commonwealth.* 68

SLANDER.

1. Words spoken of plaintiff, in the character of the judge, are actionable without colloquium or innuendo. *Hook v. Hackney.* 385

STREETS.

See PITTSBURG. NUISANCE.

SURETY.

See EXECUTION, 1.

1. Of the relation of principal and surety, and how far the acts of the creditor will discharge the surety.

A. having become the purchaser of land sold by the administrators of B., under a decree of the Orphans' Court, gave bond for the purchase money, with C. as his surety, which bond was a lien on the land sold. A. afterwards sold to D. The circumstances of A. being on the decline, the obligees gave notice to D. not to pay over any more of the purchase money, as they should look to the lands for payment of the bond they held; in consequence of which D. retained in his hands an amount sufficient to satisfy their demand. C., the surety, died, and no demand was made on his executors by the administrators of C. for payment of the bond, until suit was brought upon it, and A. had become entirely insolvent. The administrators of B. afterwards brought

an ejectment against D. for the premises. *Held*, that under the circumstances of the case, the administrators of B. were not entitled to recover against the executors of the surety until after they had exhausted the land.

It seems, that in such a case, the court should instruct the jury, if the facts were proved, to find for the plaintiffs, with a condition, that all further proceedings should stay, until the plaintiffs authorized the defendant to proceed against the fund at his cost, and, if that fund turned out defective, then that they should proceed by execution on the judgment upon the bond. *Hawk v. Geddis.* 23

TAXES.

See UNSEATED LANDS.

TENANTS IN COMMON.

See WITNESS. EXECUTORS AND ADMINISTRATORS, 6.

TENDER.

See VENDOR AND VENDEE. EXECUTORS AND ADMINISTRATORS.

1. When the plaintiff relies on an equitable title, tender of money due must precede the action.

The trustee is the person, to whom a tender of money due, the *cestui que trust* should be made. *Chahoon v. Hollenback.* 425

TERRE-TENANTS.

See SCIRE FACIAS. WITNESS.

TROVER.

See ACTION.

UNSEATED LANDS.

1. Under the act of the 3d of *April*, 1804, for the sale of unseated lands for taxes, it is necessary, in order to make the newspapers containing the commissioner's notice evidence,

that with each newspaper in which the notice is published, there should be filed the affidavit of the printer of such paper.

Query, If the land be assessed in the name of *Nathan L.*, whether a sale of it for taxes in the name of *Nathaniel L.*, is valid. *Luffborough v. Parker.* 351

2. What documents are admissible in evidence to support a sale of unseated lands for taxes, under the act of the 3d of *April*, 1804. *Ibid.*

VENDOR AND VENDEE.

See WITNESS, 5. NOTICE, 1. DEVISE.

1. If a vendor on a contract of sale conceal the fact that part of the land contracted for belongs to a third person, it is a fraud.

The covenant of warranty by such person, contained in a deed afterwards made by him in favour of the vendee, is not an equivalent for the covenant of the vendor.

If such third person delay executing the title, declaring he would keep the land, or convey it only on certain terms, his conveyance at a late day will not entitle the vendor to relief.

If such third person, by collusion with the vendee, swear in a judicial proceeding, that the contract of sale is at an end, neither can, afterwards, set it up against the other. *Grant v. Cook.* 198

2. Judgment against one who has articulated to sell, but made no deed, nor received the whole purchase money, is a lien on the vendor's interest; and, if the vendee purchase a mortgage made by the vendor prior to the sale, he is justified in having a sale under the mortgage to obtain the title clear of incumbrances, and is to be allowed by

the vendor the costs of such sale. *Fasholt v. Reed.* 266

3. It is settled, that a purchaser by articles, entering and continuing in possession, must pay interest, though there may be cases where the jury would be justified in refusing it. *Ibid.*

4. A vendee of land, by articles not recorded, pays the first instalment, and for near six years takes no further steps to comply with the contract; the vendor then sells to a third person, who was led to believe by the declarations of the first vendee, that he had relinquished the contract, and who goes on to make valuable improvements: if there was no fraud in the second vendee, he is entitled to hold the land against the first vendee; and the latter must look to the vendor for the purchase money he has paid. *Harvorthorn v. Bronson.* 268

5. A purchaser at a judicial sale of the land of A., has a right to show, in ejectment for a share of the land by B., who was the former owner of that share, that B. had for a long time left the plaintiff in possession of the whole, and had repeatedly declared, that he had sold his share to A.: that he had returned other land to the assessor, and not this, and made other declarations, proving that he had parted with his title to A.: and if B. alleges the purchase money due by A. not to be paid, he is bound to show it.

The books of the commissioners, showing the property to have been assessed as A's., are evidence, in connexion with such declarations, against B. *Van-kirk v. Clark.* 286

6. L., by articles of agreement, sold a lot of ground to P., and took single bills for the purchase money, all of which were

satisfied except two. The lot was afterwards sold as the property of P., on a judgment against him, obtained after the sale by B., and was purchased at sheriff's sale by H., who sold to L. L., afterwards sued P., on the two single bills. *Held*, that he was not entitled to recover. *Purviance v. Lemmon*. 292

7. Where two purchase together, a tender of a deed by the vendor to one of them, is sufficient. The want of an averment of tender of the deed in the declaration in a suit for the purchase money of land, is cured by the verdict. *Dawson v. Ewing*. 371
8. The heirs of a vendor are, generally speaking, bound to convey land sold by the ancestor, and paid for; but an improvement right rests on peculiar principles; it may have been abandoned by the vendee, or the lines left unsettled, and after a lapse of thirty years or more, the heirs would not be liable to the vendee. *Walker v. Walker*. 379
9. Judgments against vendor and vendee respectively, by their different creditors, bind the right of each in the land, whether legal or equitable. *Chahoon v. Hollenback*. 425

VERDICT.

See EXECUTORS AND ADMINISTRATORS, 1.

1. A verdict in ejectment for the mortgagee, "he to extinguish all claims of the *Miles* family," is uncertain and erroneous. *Bagley v. Wallace*. 245
2. A former verdict and judgment for the plaintiff in replevin, on the issue of no rent in arrear, is a bar to an action for use and occupation, for the same rent for which distress was made, if it appear by the

pleadings, that a certain rent was reserved, and that the distress was for the same rent now claimed, whether the former judgment be pleaded as an estoppel, or given in evidence on the general issue. *Cist v. Zeigler*. 287

3. After the verdict is received and recorded, and the jury dismissed, they cannot alter their verdict on a certificate of mistake in rendering it.

Such improper alteration is the subject of a writ of error. *Walters v. Junkins*. 414

4. On appeal from the Circuit Court, the court will not set aside a verdict for mere misprision of pleading; it must appear injustice has been done, or some plain mistake been committed. *Commonwealth v. Matcer*. 416

WAGER.

1. Money bet upon an election, and deposited with a stakeholder, who after the event of the election is known, has notice not to pay it over to the winner, may be recovered back by the loser. *McAllister v. Hoffman*. 147

WARRANTY.

See VENDOR AND VENDEE, 1. PAYMENT WITH LEAVE, 1.

1. *Query*, Whether the words *grant* and *enfeoff*, in a deed, amount to a general warranty. *Christine v. Whitehill*. 98
2. Any words in a deed, which show that a party asserted a thing to have been done, material to the contract, amount to a covenant that such thing has been done. Therefore, a recital in a deed, by the grantor, that the lands granted are part of a larger tract late the property of A. B. of, &c., deceased, which was decreed by an Orphans' Court, of, &c., held, &c.,

unto the grantor, one of the sons of the said A. B. deceased, and which the other heirs of the said A. B. did, by their deeds of release, grant and confirm to the said grantor, and to his heirs and assigns for ever, is a covenant that the grantor was seised of an estate in fee simple in the lands granted. *Ib.*

WILL.

1. Where one witness swears directly to the execution or publication of a paper as a last will, proof by other witnesses of declarations by the testator that he had made a will, must, in order to establish the will, be in reference to that particular paper. *Reynolds v. Reynolds.* 82
2. A devisee, who attested the will as a witness, is a good witness to prove the will, if before the trial thereof on a feigned issue, such devisee and her husband transfer their interest, and receive a release to the husband of all actions, from the transferee. *Kerns v. Soxman.* 315
3. To set aside a will duly executed by a man of competent understanding, evidence is not admissible of declarations made by him, that he intended differently, and was importuned by his wife, or of the wife's high temper and interference with the testator in relation to his will. *Moritz v. Brough.* 403

WITNESS.

See WILL.

1. A party cannot, before he has opened his case, introduce it to

the jury, by cross-examining the witnesses of the adverse party. In what manner, and to what extent, a witness may be cross-examined. *Ellmaker v. Buckley.* 72

2. A tenant in common is a competent witness for his co-tenant, in an ejectment brought by the latter. *Bennett v. Hethington.* 193
3. A devisee who releases all interest under a will, is a competent witness for the trustee appointed by it. *Cook v. Grant.* 198
4. A tenant's wife is not a competent witness for the defendant in ejectment, where such tenant is in possession of lands described in the statement, and a general defence has been taken. *Pipher v. Lodge.* 214
5. A person who had become surety for a vendor to the first vendee, for the performance of his contract, is a good witness for the second vendee, to prove that the former had relinquished his contract. *Hawthorn v. Bronson.* 269

WORK AND LABOUR.

1. A tradesman who moves from one part of the country to another, and there does work, without any agreement as to price, is entitled to the usual price of the place where the work is done, and not that of the neighbourhood from which he removed. *Gracy v. Bailee.* 126

WRIT OF ERROR.

See ERROR.



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